Petition

81-1112

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.,
Petitioners,

v.

ROBERT W. JOHNSON, ET AL.,
AND
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Which constitutional power did the Congress of the United States invoke when it enacted the 1974 Amendment to the Age Discrimination in Employment Act of 1967,[1] and extended the scope of the Act to include State and local government?

a) If Congress relied on the powers given to it by the Commerce Clause of the U.S. Constitution, does the Tenth Amendment to the Constitution serve as a bar to the application of the ADEA to State and local government in this situation?

b) If Congress relied on the powers given to it by the Enforcement Clause (Section 5) of the Fourteenth Amendment, may the United States Courts of Appeals raise the level of judicial scrutiny, by virtue of the Enforcement Clause, beyond "reasonableness" (which "reasonableness" standard was established by this Court[2])?

2. If "[t]here is a national interest that [may] 'loom larger when balanced against Defendants' . . . interest in discrimination against its employees on the basis of age', . . . [h]ow can there be a supervening national interest when the nation itself requires mandatory retirement of its law enforcement personnel"?[3]

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[1] Age Discrimination in Employment Act of 1967, (hereinafter referred to as ADEA), 29 U.S.C. (& Supp. III) 621 *et seq.;* Amendment — 29 U.S.C. Section 630 (b)(2), Pub. L. 93-259, Section 28 (a)(1)-(4), April 8, 1974, 88 Stat. 74 — The relevant part of the Amendment is reprinted as Appendix G, *infra,* p. 60a.

[2] *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976).

[3] *Equal Employment Opportunity Commission v. State of Wyoming,* 514 F. Supp. 595, 600 (D. Wyo. 1981) See Appendix F, *infra,* p. 47a; and see: *Bowman v. United States Department of Justice,* 510 F. Supp. 1183 (1981).

PARTIES

The Mayor and City Council of Baltimore
and Hyman A. Pressman, as Chairman and
Donald D. Pomerleau, Calhoun Bond,
Edward C. Heckrotte, Sr.,
Charles Daugherty, Paul C. Wolman, Jr., and
Curt Heinfelder, members
of the Board of Trustees, Fire and
Police Employees Retirement System
of the City of Baltimore,

Petitioners,

v.

Robert W. Johnson, August T. Stern, Jr.,
Thomas C. Doyle, Mitchell Paris,
Robert L. Robey and James Lee Porter,

and

Equal Employment Opportunity Commission,

Respondents.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to the Court of Appeals to review the judgment in this case of the United States District Court for the District of Maryland.

OPINION BELOW

The opinion and judgment of the District Court are reported at 515 F. Supp. 1287 (D. Md. 1981) (Reprinted

herein as Appendix A and B, *infra*, p. 1a-32a). Since the District Court held that the decision of the Court of Appeals in *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir., 1977) precludes, in main part, the relief sought by petitioners, the *Arritt* opinion is included herein (Reprinted as Appendix E, *infra*, p. 39a).

JURISDICTION

On June 9, 1981, the United States District Court for the District of Maryland filed its opinion in this case following a trial on the merits (See Appendix A, *infra*, p. 1a). On August 13, 1981, a Judgment and Decree was filed (See Appendix B, *infra*, p. 31a). A Motion for Reconsideration of Judgment and Decree was filed by the Defendants on August 20, 1981. Final Judgment was entered against petitioners on September 14, 1981 (See Appendix C, *infra*, p. 33a-36a). Petitioners docketed their appeal in the Court of Appeals for the Fourth Circuit on October 1, 1981.

Petitioners are invoking jurisdiction of this Court under 28 U.S.C. 1254 (1) and 28 U.S.C. 2101 (c) and (e) to grant certiorari before judgment in the Court of Appeals because constitutional issues pending before this Court in *Equal Employment Opportunity Commission v. State of Wyoming*, 514 F. Supp. 595, (D. Wyo., 1981), Jurisdictional Statement of the Solicitor General (U.S. No. 81-554, September 17, 1981), are so amplified and illuminated by the record herein as to render concurrent consideration of petitioners' and the *E.E.O.C. v. Wyoming* case a matter of "imperative public importance". Rule *18; cf. Bolling v. Sharpe*, 347 U.S. 497, 498 and *Taylor v. McElroy*, 358 U.S. 918 and 360 U.S. 709.[4]

[4] In Point II of the Reasons for Granting the Writ, *infra*, p. 13 to 17, petitioners indicate the ways in which the record herein amplifies and illuminates the vital constitutional issues now pending before this Court. In addition, however, the Court

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The relevant provisions of the United States Constitution; the Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 621 *et seq.*; Government Organization and Employees — Retirement, 5 U.S.C. 8335 (b); and the Fire and Police Employees Retirement System of the City of Baltimore, Baltimore City Code, Article 22, Section 29 *et seq.*, are set forth in Appendix G, *infra*, p. 60a.

STATEMENT

As early as 1858, the Mayor of Baltimore recognized that protection from conflagration was so essential that it required legislation and supervision by the petitioners. With the creation of the Baltimore City Fire Department came the obligation to compensate its members for the burdens they bore, particularly those of increased severity of injury and decreased longevity. For numerous reasons argued below, the retirement system formulated in 1926 and mandating retirement at age seventy[5] did not adequately serve the needs of the petitioners' public safety personnel. Membership unions for public safety personnel sought to remedy a perceived deficiency in the petitioners' general retirement ordinance, and the end result was the

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should note that this is a case of review "before judgment" only in a technical sense. The District Court held that in regard to the constitutional issues it was bound by the decision of the Fourth Circuit in *Arritt, supra*. Although binding in the Fourth Circuit, *Arritt* was remanded to the lower court (D W. VA), settled pursuant to a sealed agreement, and consequently never presented to this Court for judicial review. The only judgment that the Fourth Circuit could enter would be a *pro forma* affirmance on the authority of its prior *Arritt* decision, which would in no way assist this Court in resolving the pending issues.

[5] "The Employees Retirement System of the City of Baltimore", generally "ERS", which appears as Baltimore City Code, Article 22, Secs. 1-16 and 42-43.

creation of a new retirement system, whose fire and police members were to be the only municipal workers so enrolled. According to undisputed testimony provided by the petitioner's Director of Finance and Fire Chief, the ordinance challenged below was adopted as a result of the local legislature's investigation and fact finding concerning the prevalence of heart and other occupational disease in the public safety occupations and mortality data which had showed that a great many of those in the public safety occupations were not living long enough to retire.[6] In part, because an amendment to the general City pension system providing for special terms of compensability for heart disease was declared illegal, in 1962 the petitioners establised the Fire and Police Employees Retirement System of the City of Baltimore appearing as Baltimore City Code, Article 22, Section 29 *et seq.*, including, *inter alia*, mandatory retirement ages of 65 for fire officers and 55 for other fire combat personnel.[7] The selection of these ages was based upon evidence concerning the prevalence of disease and mortality in public safety occupations and the effect of losing through retirement a given portion of the group of public safety employees and officers. Since ages less than 70 were ultimately selected, it was necessary to increase the "value" of each year of employment (service credit) to offset a decrease in the number of years in which employment was allowed.[8]

[6] Under the ERS, the earliest a member could retire on a service allowance was (and is) age 60. Baltimore City Code, Article 22, Section 6(a) "Service Retirement Benefits".

[7] A "grandfathering" clause allowed members in service on the date of passage of the new ordinance to continue in employment until each had accumulated 25 years' accredited service. Baltimore City Code, Article 22, Sec. 34 (a)(2). Non-officers in service on July 1, 1962, such as several of the respondents, could continue to age sixty. Sec. 34 (a)(4).

[8] Extending these weighted benefits, which have *already* been enhanced to reflect a shorter working life, from the ages of 55 and 60 to the ages of 65 or 70, greviously endangers the retirement systems' actuarial soundness, and tends to discriminate against the balance of City employees in the general City pension system (ERS).

Integrated with the Maryland Workmen's Compensation Law, Annotated Code of Maryland, Article 101, Section 1, *et. seq.*, the Fire and Police Employees Retirement System provides a comprehensive scheme of service and disability benefits designed to protect an employee by affording lifetime benefits. The Fire and Police Employees Retirement System provides an employee retiring on service benefits with approximately the same percentage of average final compensation upon mandatory retirement at age 55 as would be received by an employee covered by the petitioners' general retirement plan (ERS) upon reaching his mandatory retirement age of 70. The classifications for disability retirement under the Fire and Police Employees Retirement System are liberal, and when combined with the statutory presumption under the Annotated Code of Maryland, Article 101, Section 64A, afford a member who is totally precluded from employment as a result of heart or respiratory disease not only a presumption of causal connection of the disease to his employment, but a continuation of his entire salary, tax free, for life.

The statutory scheme of benefits provided by the petitioners is not unlike the scheme afforded by many State and local governments. Indeed the federal government by statute mandates retirement at age 55, the same age which was held illegal in the instant case, for many positions including, *inter alia*, law enforcement and firefighting personnel. The legislative history of Baltimore City Code, Article 22, Section 34 as related by the petitioners below and that of 5 U.S.C. 8335 (b) is similar if not identical.[9] Certainly the rationale behind the mandatory retirement of public safety personnel is the same

[9] 5 U.S.C. Section 8335 — Legislative History, P.L. 93-350; 88 Stat. 355; Law Enforcement and Firefighter Personnel — Retirement, United States Congressional and Administrative News, 93rd Congress — 2nd Session (1974), Volume II, p. 3699.

whether those persons are F.B.I. agents,[10] other public safety personnel employed by the Federal Government,[11] an employee of the Department of Parks in Wyoming[12] or fire combat positions in the Baltimore City Fire Department.

Almost twenty years after the enactment of the Fire and Police Employees Retirement System, the respondents, six Baltimore City firefighters, have brought a civil action which challenges the legality of these applicable provisions, Section 34 (a)(2)(4), Article 22, (See Appendix G, *infra*, p. 64a) of the Baltimore City Code insofar as they may be in violation of the provisions of the ADEA, as amended and applied to State and local government.

Jurisdiction in the lower Court was pleaded as 28 U.S.C. Section 1331, 1343 (3)(4), 2201 and 2202. A trial was held on the merits and included extensive expert medical testimony.

On June 9, 1981, the United States District Court issued its opinion and granted relief to the respondents herein, stating:

> The recent *Arritt* decision is controlling in this case. As the Fourth Circuit there held, the 1974 Amendments to the ADEA are not unconstitutional. Thus, the City of Baltimore is subject to the provisions of the ADEA, and if a City ordinance conflicts with

[10] *Statement of J. Edgar Hoover*, — Director, Federal Bureau of Investigation (6-9-71), presented to the House Subcommittee on Retirement Insurance and Health Benefits of the House Committee on Post Office and Civil Service, 92nd Congress, 1st Session, by John P. Mohr, Assistant to the Director; hearing on Liberalization of Retirement for Specialized and Hazardous Occupations (June 14th and 21st, 1971).

[11] 5 U.S.C. Section 8335 (b) (See Appendix G, *infra*, p. 63a).

[12] *E.E.O.C. v. Wyoming, supra.*

> provisions of this Congressional statute, the ordinance in question must fall. (Footnotes omitted).[13]

On October 1, 1981, petitioners docketed their appeal in the Court of Appeals.

During September, 1981, the United States Solicitor General filed a Jurisdictional Statement on the matter of *EEOC v. Wyoming, supra* concluding that the constitutional issue raised here presented a substantial question and argued that "probable jurisdiction should be noted" by this Court.[14]

In *EEOC v. Wyoming, supra,* the District Court held that the provisions of the ADEA could not be applied to invalidate Wyoming's mandatory retirement provisions contained in Section 31-3-107 of the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, Wyo. Stat. Section 31-3-101, *et seq.* (1977). The *Wyoming* Court, after criticizing the Fourth Circuit's holding in *Arritt*[15] concluded that the ADEA ". . . was passed only under the Commerce power of Congress" and that the ADEA as applied to the State of Wyoming was ". . . contrary to the Tenth Amendment and to the holding of the *National League of Cities v. Usery,* [426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245, (1976)]."[16]

Despite the reasoning argued below and subsequently held controlling in *Wyoming,* in the instant case the lower Court relied upon *Arritt* and wrote:

> Writing on behalf of the panel, Judge Thomsen concluded that in enacting the ADEA and extending it to the states, Congress had exercised its powers under Section 5 of the Fourteenth Amendment rather than under the Commerce Clause. 567 F.2d at

[13] *Johnson, supra,* 515 F. Supp. at 1292 (See Appendix A, *infra.*, p. 9a).

[14] 28 U.S.C. Section 1252.

[15] *EEOC v. Wyoming, supra,* 514 F. Supp. at 598.

[16] *EEOC v. Wyoming, supra,* 514 F. Supp. at 600.

1270-1271. *Johnson, supra,* 515 F. Supp. at 1292. (Appendix A, *infra.*, p. 9a).

The Court in *EEOC v. Wyoming* concluded:

> We believe that Justice Blackmun's concurrence on the understanding that the *National League* majority was adopting a 'balancing approach' provides the key to a correct understanding of *National League,* namely, that the Courts must use an ad hoc balancing test of weighing the national interest and policy against the State activity sought to be displaced by federal regulation. Here, Justice Rehnquist's own references to the police protection and parks and recreation as typical State services traditionally rendered by States plus the inconsistency of the United States, require us to strike the balance for the State. *Wyoming, supra,* 514 F. Supp. at 600 (Appendix F, *infra.*, p. 57a).

Arritt, which was followed in the instant case and other lower court decisions, stands for the proposition that Section 5 of the Fourteenth Amendment is the constitutional authority which Congress used to extend coverage of the ADEA to State and local government. *Wyoming,* now pending before this Court, marks the Commerce Clause as documented constitutional authority for the ADEA with the Tenth Amendment barring the Act's application to State and local government in the area of law enforcement; specifically, Wyoming State Game Wardens.

This Court may be aided by allowing a writ of certiorari to issue, not only due to the similar constitutional issues presented by both *Wyoming* and the petitioners' case, but also because *Wyoming* involves the retirement of a State Game Warden, while the instant case involves municipal firefighters. Fire suppression requires the highest possible commitment to preparedness and is quintessential to any concept of "public safety."

This petition is being filed promptly and before judgment in the Court of Appeals (cf. *Brown v. Board of Education*, 344 U.S. 1, 3; *Bolling v. Sharpe*, 347 U.S. 497, 498; *Taylor v. McElroy*, 358 U.S. 918 and 360 U.S. 709) in the belief that a *pro forma* affirmance by the Court of Appeals on the authority of *Arritt* would not assist this Court in the disposing of the grave constitutional issues involved herein, and with confidence that the record below will materially amplify and illuminate that issue.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION *ASSIGNING* CONSTITUTIONAL AUTHORITY TO ACTS OF CONGRESS, DISPLACES STATE AND LOCAL GOVERNMENT'S ABILITY TO FUNCTION EFFECTIVELY IN A FEDERAL SYSTEM AND TO PERFORM ITS TRADITIONAL INTEGRAL FUNCTIONS AND THEREFORE CALLS FOR REVIEW BY THIS COURT.

A. Constitutional questions of grave importance are presented by the Fourth Circuit Court of Appeals' decision in *Arritt*, and followed by the lower Court herein, which imputes constitutional authority to Acts of Congress where no such particular authority has expressly been stated in the legislative history of the Act or in the Act itself; thus depriving State and local government of the rights reserved to them under the Tenth Amendment of the Constitution. State and local government, traditionally having the obligation to maintain safe and efficient systems of protective services, will be undermined in these efforts by being forced to keep 55 to 70 year old public safety personnel employed on the fireground and in the line of fire.

The *Wyoming* decision amply demonstrates that the ADEA was predicated upon the Commerce Clause power. Under the Commerce power and this Court's holding in

National League, it appears reasonable to conclude that the ADEA could not constitutionally be applied to State and local government, to the extent that it affects public safety personnel. In *National League*, this Court held that the 1974 Amendment to the Fair Labor Standards Act. (hereinafter referred to as FLSA), was unconstitutional as applied to State and local government because of a bar by the Tenth Amendment. The same enactment which attempted to extend coverage of the FLSA to State and local government included the Amendment to extend the ADEA to State and local government.

Arritt and its progeny collide with the holding in *Wyoming* because in *Arritt* the constitutional authority for the ADEA is grounded upon an unstated and inferred intent to legislate pursuant to the Enforcement Clause of the Fourteenth Amendment, instead of the unequivocal and stated reliance upon the commerce power found by the *Wyoming* Court.[17]

However, if such constitutional authority is attached to the Enforcement Clause of the Fourteenth Amendment,

[17] One theory which attempts to save the constitutionality of applying the ADEA to political subdivisions is that making decisions based upon age is not an "inherent attribute of the sovereign", and is thereby beyond the purview of *National League*. This view flies in the face of history and reason. Many aspects of public service have been regulated by age, from the mandatory "retirement" of citizen-soldiers in the Roman empire, to the age of majority in medieval Europe, to Constitutional requirements for elected representatives, to existing limits on those in government service. 29 U.S.C. Section 633a; (See Appendix G, *infra*, p. 61a). Despite an identical ban on age discrimination within the federal government, Congress reserved the right to establish a BFOQ of age less than 55 for all federal employees involved in public safety, from air traffic controllers to postal inspectors (5 U.S.C. Section 8335). Of course, *federal* firefighters are also mandatorily retired at 55, although it may be more than a dozen times safer to be a federal firefighter than one employed elsewhere, 5 U.S.C. Section 8335 (b); (See Appendix G, *infra*, p. 63a).

(*Arritt* finds such authority does exist, *inter alia*, under the holding of this Court in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1975)), the provisions of the ADEA might arguably be extended thereby forcing the ADEA's requirements on State and local government by making constitutional authority appear by prestidigitation. In contrast to the instant case, *Fitzpatrick* involved a challenge pursuant to Title VII of the *Civil Rights Acts of 1964*, 78 Stat. 253 *et. seq.*, as amended, 42 U.S.C. Section 2000e *et. seq.*,[18]; an Act which explicitly stated that its constitutional authority was Section 5 of the Fourteenth Amendment.

Five months before *Arritt*, the Fourth Circuit Court of Appeals stated its analysis of constitutional action under the Enforcement Clause of the Fourteenth Amendment by writing:

> Appellants argue, however, that in this case such extension must stand or fall on the Commerce Clause because Congress did not purport to act under the Fourteenth Amendment. We cannot agree. Our duty in passing on the constitutionality of legislation is to determine whether Congress had the authority to adopt the legislation, not whether it correctly guessed the source of that power. . . . We see no persuasive reason why the courts should frustrate *that intent* simply because the legislative history does not contain the magic words, "Fourteenth Amendment". *Usery v. Charleston Cty. School District, etc.*, 558 F.2d 1169, 1171 (1977) (Emphasis supplied).

A footnote in *National League* is often inappropriately viewed as opening the door for federal courts to determine exactly what *intent* the Legislature had, even though the Legislature stated authority was contrary to the courts' view of what *intent* the Legislature had. This Court wrote:

[18] As amended and applied to State and local government: Section 2 (1) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. Section 2000e (a) (1970 ed., Supp. IV [42 U.S.C. Section 2000e (a)]

> We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Article I, Section 8, cl 1, or Section 5 of the Fourteenth Amendment. *National League of Cities v. Usery,* 426 U.S. at 852 n.17.

This footnote addressed itself to legislation already enacted that had certain specific constitutional authority, not to legislation already enacted under a different or non-existent constitutional power. For if it were otherwise, why did not this Court merely *assign* a basis under the Fourteenth Amendment power to the FLSA Amendments, precluding the entire holding based upon Tenth Amendment limits upon Commerce Clause authority? The minimum wage-maximum hour provisions extended to political subdivisions could have been (but clearly weren't) enacted to afford all persons the equal protection of the law.

Four days after *National League,* this Court in *Fitzpatrick v. Bitzer* allowed the reach of Title VII to extend to State and local government in the area of sex discrimination because there existed clear and specific reliance upon Fourteenth Amendment authority in the Act. The *Arritt* Court interpreted this holding to mean that the ADEA could be applied to State and local government by assuming Fourteenth Amendment authority for the Act and the 1974 Amendment.

Most recently, however, in *Pennhurst State School and Hospitals v. Halderman,* ___ U.S. ___, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981), this Court clarified the *National League* footnote for questions involving the spending power and Section 5 of the Fourteenth Amendment. Justice Rehnquist stated:

> Because such legislation imposes congressional policy on a State involuntarily, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.

It is imperative that this Court extricate political subdivisions from this web of federal control, which control impermissibly disrupts local legislative judgments and unnecessarily threatens the public safety.

B. There is a clear conflict between the various lower courts on the constitutional authority of the ADEA as amended and applied to State and local government[19] and conflict between the Fourth Circuit's decisions in *Usery v. Charleston Cty, supra,* and *Arritt* with this Court's pronouncements in *Pennhurst.* While political subidivisions are fulfilling responsibilities which are uniquely those of government, the Tenth Amendment must stand as a bar to federal intrusion. This Court has consistently found the Constitution to be vital and vibrant, and as far as possible it should not be read so as to contain a single "dead letter."

Each of these grounds for certiorari appears adequate. The only remaining question is whether concurrent consideration of petitioners' case will assist this Court in resolving those vital issues now pending before it.

II.

THE RECORD IN PETITIONERS' CASE PROVIDES MATERIAL ILLUMINATION AND AMPLIFICATION OF THE CONSTITUTIONAL ISSUES NOW BEFORE THIS COURT.

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[19] E.g., (Section 5, 14th Amendment) *Arritt supra; Remmick v. Barnes City.*, 435 F. Supp. 914 (D. N.D., 1977); *Aaron v. Davis,* 424 F. Supp. 1238, (D. Ark., 1976); *Marshall v. Delaware River and Bay Authority,* 471 F. Supp. 886, (D. Del. 1979); *Beck v. Borough of Manheim,* 24 FEP Cases 1300 (D. Pa. 1981).

(Commerce Clause) *EEOC v. Wyoming, supra; Usery v. Manchester East Catholic Reg. School Board* 430 F. Supp. 188 (D. N.H. 1977); *Marshall v. Baltimore and O.R. Co.,* 461 F. Supp. 362 (D. Md. 1978).

(Section 5, 14th Amendment and Commerce Clause) *Usery v. Board of Education of Salt Lake City,* 421 F. Supp. 718 (D. Utah 1976).

This court might well desire, in deciding an issue of first instance vitally affecting the lives and security of American citizens, to have before it more than one set of facts illustrating the operation of this Amendment to the ADEA. This might be true even if both illustrations of the operation were factually quite similar. Here, however, petitioners respectfully suggest that the record in their case will not only add a broader factual basis for this Court's determination, but will present the constitutional issues to the Court more sharply defined and more fully documented than does the record in *Wyoming*.

A. The factual pattern in the *Wyoming* case involves a State Game Warden, while the factual pattern in petitioners' case encompasses almost all of its firefighters.[20] In fact, another case, *Scott v. Mayor and City Council of Baltimore*, C.A. No. H-79-2197, is now pending before the same District Court, the disposition of which is awaiting the final outcome of the petitioners' present case. *Scott* involves the petitioners' Police Department and is essentially identical to the instant case on all grounds.

Whatever the outcome of the *Wyoming* case, its decision will affect most all the public safety agencies of the entire country. In the petitioners' case below, an ample record was made through documentation and testimony related to the performance of fire departments in a municipality such as Baltimore, Maryland. Additionally, extensive medical testimony from both sides was received from highly qualified medical authorities, which testimony will make this Court aware of the conflict that now exists in medical science concerning the ability to test an individual to determine his or her physical and mental health and capability past the fifth decade.

[20] Fire officers, whose retirement is mandated at age 65, were not included in the instant case. Because of a sharply limited budget, officers too must on occasion and in a limited sense be "firefighters" engaged in fire suppression and rescue.

B. Viewed in light of the extensive medical testimony presented at trial, the virtual agreement between the experts that heart disease increases in the number afflicted and the extent to which those afflicted are endangered by the disease, the lower Court's opinion reflects the unreasonably constrained way in which the Bona Fide Occupational Qualification (BFOQ)[21] is applied by the courts.[22] Thus the Act, as applied by the lower Court and others, is the sort of impermissible intrusion voided by this Court in *National League*. The record below presents not only the stark technical question concerning the Act's legislative history, but demonstrates that, when applied as an entity, the Act interferes with the States and local government to the extent that public safety is disrupted. To those who would resolve the Act into bits and pieces in order to save its constitutionality, the decision below is profound evidence that as it is applied by EEOC, the Department of Labor and the Courts, the Act vitiates, in part, the guarantees of local sovereignty found in the Tenth Amendment and set forth by this court in *National League*.

To find to the contrary would be to place the petitioners and others similarly situated on the "horns of a dilemma." For an act to be found not violative of the Tenth Amendment, it must not unjustifiedly affect integral governmental functions. That, on one side, the Act allowed petitioners to present medical evidence means nothing if

[21] The BFOQ exception allows an employer to discriminate on the basis of age "where age is a bonafide occupational qualification reasonably necessary to the normal operation of the particular business". ADEA — Section 4 (f)(1), 29 U.S.C. 623 (f)(1) — See Appendix G, *infra.*, p. 60a.

[22] For example, the lower Court held that despite *respondents'* evidence of markedly increased rates of primary coronary events in the sixth decade (midpoint at 55), because of surgical procedures like coronary catheterization, petitioners could not rely upon the Bona Fide Occupational exception. Appendix A, *infra.*, p. 23a.

on the other side, the standard by which that evidence is measured or the test which the evidence must satisfy is unreasonably great and thereby oppressive. It is only when the Act, its application, and the interference with public safety are viewed together that the full picture is presented. In the *Wyoming* case a Motion to Dismiss was granted, and from that a direct appeal was taken. The record therein is necessarily scant: the record in the instant case not only allows the conclusion *that* the Act is unconstitutional, but demonstrates *why* the Act is unconstitutional.

Moreover, the Fourth Circuit's interpretation and application of the BFOQ test in *Arritt*[23], as applied at trial in the petitioners' case, raises the judicial constitutional scrutiny, as set out by this Court in *Murgia, supra.*, from a rational relation to a legitimate State interest, to a stricter standard of scrutiny. The Circuit Court's judicially enacted BFOQ test, by its strictness, utterly destroys the stated intentions of Congress regarding firefighters and law enforcement personnel, and allows the Courts of Appeals to expand, not extend,[24] equal protection categories presumably through an unstated Congressional intent.

Furthermore, this Court in *Murgia* stated that "age is not a suspect class" and classifications based thereon were subject to a reasonableness standard. The Circuit Courts have adopted a BFOQ test which, at trial and on appeal, intensifies the level of judicial scrutiny. The ADEA, under the Enforcement Clause or under the Commerce Clause, states that a practice is permissible where discrimination on the basis of age is "*reasonably* necessary to the normal

[23] *Arritt*, approved the Fifth Circuits *Weeks/Diaz* Test — lately referred to as the *Tamiami* Test; See *Arritt* 567 F.2d at 1271, *Usery v. Tamiami Trail Tours* 531 F.2d 224 (5th Cir. 1976) and *Hodgson v. Greyhoud Lines*, 499 F.2d 859 (7th Cir.).

[24] See: *Katzenbach v. Morgan* 384 U.S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966).

operation of the particular business" (emphasis supplied). When the stricter *Tamiami* test is applied to age discrimination the level of judicial scrutiny is raised from "reasonableness" almost, if not completely, to a "suspect" category.

In the final analysis, the conflicting interests described will have to be evaluated by this Court and weighed to balance the injury to the individual against the injury to the public. The significant contribution of petitioners' case towards the weighing of these interests is in the clarity of its demonstration on one hand, of the absence of any genuine national interest justifying the Fourth Circuit's application of the ADEA to State and local government, and on the other hand, of the inevitable unfairness in procedure and result when the BFOQ test is incorrectly applied — no matter which constitutional authority this Court deems correct.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

United States District Court,
District of Maryland

Civ. A. No. H-79-998

Robert W. Johnson, August T. Stern, Jr., Thomas C. Doyle, Mitchell Paris, Robert L. Robey and James Lee Porter, Plaintiffs,

and

Equal Employment Opportunity Commission, Intervening Plaintiff,

v.

The Mayor and City Council of Baltimore and Hyman A. Pressman, as Chairman and Donald D. Pomerleau, Calhoun Bond, Edward C. Heckrotte, Sr., Charles Daugherty, Paul C. Wolman, Jr. and Curt Heinfelder, members of the Board of Trustees, Fire and Police Employees Retirement System of the City of Baltimore, Defendants.

June 9, 1981

Alexander Harvey, II, District Judge:

In this civil action, the six plaintiffs, who are Baltimore City firefighters, are challenging provisions of the Baltimore City Code which require that certain Fire Department employees retire at the ages of fifty-five and sixty. Plaintiffs contend that this legislation (1) violates provisions of the Age Discrimination in Employment Act

of 1967 (the "ADEA"), 29 U.S.C. § 621, *et seq*;[1] (2) contravenes 42 U.S.C. § 1983; and (3) is violative of the Fourteenth Amendment. As relief, plaintiffs are seeking a declaratory judgment, a permanent injunction, back pay for plaintiff Johnson, attorneys' fees and costs.

Five of the six plaintiffs are presently over sixty years of age.[2] Had they not filed this suit, each of these five plaintiffs would now have been mandatorily retired, pursuant to applicable provisions of the Baltimore City Code. However, with the consent of the defendants, a Temporary Restraining Order has been entered in this case, permitting these five plaintiffs to retain their jobs and their employment benefits during the pendency of this action. The sixth plaintiff, James Lee Porter, is presently thirty-two years of age. He will be required to retire under the Baltimore City law in question in the year 2003, when he becomes fifty-five.

Named as defendants are the Mayor and City Council of Baltimore and the Chairman and members of the Board of Trustees of the Fire and Police Employees Retirement System of the City of Baltimore (hereinafter the "FPERS"). Subsequent to the commencement of this action, the Equal Employment Opportunity Commission was permitted to intervene as a party plaintiff and has filed an intervening complaint. Following extensive pretrial proceedings, this case came on for trial before the undersigned Judge, sitting without a jury. Testimony was heard from expert and other witnesses, and numerous exhibits have been entered in evidence. Findings of fact and conclusions of law under Rule 52(a), F.R. Civ.P., are contained in this Opinion, whether or not expressly so designated.

[1] Plaintiffs also contend that the City ordinance violates 29 U.S.C. § 215. However, that provision of the Fair Labor Standards Act is merely an enforcement provision incorporated into the ADEA. *See* 29 U.S.C. § 626(b).

[2] Plaintiffs Johnson, Stern, Doyle, Paris and Robey are all over sixty years of age. Plaintiffs have complied with the exhaustion requirements of 29 U.S.C. § 626(d).

I

The challenged provisions of law

Prior to 1962, employees of the Baltimore City Fire Department, like other municipal employees, were covered by the Employees Retirement System of the City of Baltimore (hereinafter the "ERS").[3] *See* Article 22, §§ 1-17, Baltimore City Code (as amended). This pension and retirement system contains a provision for mandatory retirement at age seventy.

Pursuant to enabling legislation enacted by the Maryland State Legislature, the Baltimore City Council, in 1962, approved an ordinance establishing a new retirement system for Fire Department and Police Department employees only, namely the FPERS, which is at issue here. The provisions applicable in this case, as set forth in Article 22, § 34(a), Baltimore City Code (as amended), are as follows:

> (2) Any member in service who has attained the age of fifty-five shall be retired on the first day of the next calendar month after attaining such age, except that a member who has attained the rank of Fire Lieutenant or Police Sergeant, or equivalent grade as certified by the Department head and approved by the Board of Trustees, shall be retired when he has attained the age of sixty-five.
>
> * * * * * *
>
> (4) Further, anything in this subtitle to the contrary notwithstanding, any employee covered by this System, under the rank of Fire Lieutenant or Police Sergeant, or equivalent grade, who was in service on July 1, 1962, may be continued in service until attaining age 60.

In this suit, the plaintiffs contend that these provisions which require them to retire at ages fifty-five and sixty violate the ADEA, § 1983 and the Fourteenth Amendment.

[3] Employees of the City of Baltimore other than firefighters and policemen continue to be covered by the ERS.

II

Facts

Plaintiff Robert W. Johnson commenced his employment with the Baltimore City Fire Department in October of 1943. On April 29, 1979, Johnson attained the age of sixty years. Under § 34(a)(4), Johnson was retired involuntarily on May 1, 1979. This suit was filed on May 29, 1979. Pursuant to the Temporary Restraining Order entered by the Court, Johnson was restored to pay status on June 11, 1979.[4] In addition to the other relief sought by the other plaintiffs, Johnson seeks back pay from May 1 to June 11, 1979 in the amount of $1,000.00. Plaintiff August T. Stern, Jr. commenced his employment with the Fire Department in February 1946. He became sixty years of age on September 17, 1979. Plaintiff Thomas C. Doyle started working with the Fire Department in March of 1947, and became sixty years of age on October 7, 1979. Plaintiff Mitchell Paris commenced his employment with the Fire Department in December of 1946, and he attained the age of sixty on January 21, 1981. Plaintiff Robert L. Robey started working with the Fire Department on October 10, 1951, and became sixty on March 26, 1981. Plaintiffs Stern, Doyle, Paris and Robey have also been continued as Baltimore City firefighters pursuant to this Court's Temporary Restraining Order. Like plaintiff Johnson, they all desire to continue to work for the Baltimore City Fire Department beyond age sixty. Plaintiffs are not here challenging the right of the defendants to retire them involuntarily at age sixty-five, which is the mandatory retirement age under present law for Lieutenants and other officers of the Fire Department.

Plaintiff James Lee Porter commenced his employment with the Baltimore City Fire Department on May 6, 1969. On October 23, 2003, plaintiff Porter will attain the age of fifty-five. Since he did not become a firefighter until after

[4] Plaintiff Johnson is the only one of the plaintiffs whose employment has been interrupted. Thus, he is the only plaintiff seeking back pay.

July 1, 1962, he will be required under the aforementioned § 34(a)(2) and (4) to retire at age fifty-five whether he wishes to or not.

Plaintiffs Johnson, Stern, Doyle, Paris and Robey were all formerly members of the ERS. When the new ordinance establishing the FPERS was adopted by the City Council in 1962, there five plaintiffs, in 1962 or thereafter, chose to be covered by the new retirement system rather than the old.

III

The ADEA

When it enacted the ADEA in 1967, Congress included a statement of its findings and purpose in passing this legislation. 29 U.S.C. § 621 provides as follows:

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age

discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 623(a)(1) is as follows:

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; * * *.

As originally enacted in 1967, the ADEA was not applicable to governmental entities. However, in 1974, Congress amended the Act to include states and political subdivisions within its coverage. The term "employer" now includes "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State * * *" *See* 29 U.S.C. § 630(b).

Certain employer practices were recognized by the Act as being lawful. § 623(f)(1) provides as follows:

(f) It shall not be unlawful for an employer * * * (1) to take any action otherwise prohibited under subsections (a) * * * of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age; * * *.

As originally enacted in 1967, § 623(f)(2) provided as follows:

(f) It shall not be unlawful for an employer * * * (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual;

In 1978, § 623(f)(2) was amended so that it now reads:

> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, *and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual.* (Emphasis added.)

Congress added the language emphasized above for the express purpose of overruling the Supreme Court's decision in *United Air Lines, Inc. v. McMann,* 434 U.S. 192, 98 S. Ct. 444, 54 L. Ed. 2d 402 (1977). *See* House Conference Report 95-950, 95th Cong., 2d Session, [1978] U.S. Code Cong. and Admin. News, pp. 504, 529. In the *McMann* case, the Supreme Court had held that a bona fide pension plan established prior to the effective date of the ADEA could not be a subterfuge to evade the purposes of the Act. 434 U.S. at 203. The 1978 amendment to § 623(f)(2) makes it clear that the Act applies to FPERS, even though that retirement plan was established before the ADEA was enacted. Furthermore, as the Fourth Circuit noted in *EEOC v. Baltimore and Ohio R.R. Co.,* 632 F.2d 1107, 1112 (4th Cir. 1980), the 1978 amendment explicitly prohibits the provisions of § 623(f)(2) from being utilized as a defense to involuntary retirement of protected individuals.

In this suit, plaintiffs assert that § 34(a)(2) and (4) of Article 22 of the Baltimore City Code are contrary to § 623(a)(1) and § 623(f)(2) because the FPERS requires the involuntary retirement of each of them because of their age. Defendants contend (1) that the ADEA is unconstitutional; (2) that plaintiffs have waived their right to rely on the benefits of this federal statute; and (3) that pursuant to § 623(f)(1), age is a bona fide occupational qualification for firefighters which is reasonably necessary to the normal operation of the Baltimore City Fire Department.

IV

The constitutionality of the ADEA as applied to states and political subdivisions

Relying on *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), defendants first contend that the ADEA may not be constitutionally applied to employees of a state or political subdivision as noted hereinabove, Congress amended the Act in 1974 to include states and political subdivisions within the definition of the term "employer", as used in the Act. *See* 29 U.S.C. § 630(b).[5] Defendants contend that by extending the coverage of the ADEA to public employees in 1974, Congress has unconstitutionally usurped the regulation of essential government functions properly reserved to state and local governments.

Defendants' constitutional argument was previously rejected by the Fourth Circuit in *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977). In that case, a police officer in Moundsville, West Virginia had been denied employment by that city because he was forty years of age and therefore ineligible to take the required physical and mental examinations under West Virginia law, which had established an eighteen to thirty-five year age limit for such applicants. In an opinion written by Judge Thomsen, the Fourth Circuit reversed the District Court's entry of summary judgment in favor of the defendants and remanded the case to the lower court for the development of a full factual record concerning plaintiff's claim that the West Virginia statute violated the ADEA.

As in this case, the defendants in *Arritt* argued that the Supreme Court decision in *National League of Cities v. Usery, supra*, invalidated the 1974 amendments to the ADEA which extended coverage of its antidiscrimination provisions to state and local government employers. That decision of the Supreme Court had held that the extension of provisions of the Fair Labor Standards Act to state and

[5] This amendment became effective on May 1, 1974.

local government employees engaged in areas of traditional governmental functions could not be upheld as a constitutionally valid regulation of interstate commerce because the Tenth Amendment limits exercise of the powers of Congress under the commerce clause. After considering the legislative history of the ADEA and the Supreme Court's opinion in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976), the Fourth Circuit in *Arritt* upheld the 1974 amendments to the Act. Writing on behalf of the panel, Judge Thomsen concluded that in enacting the ADEA and extending it to the states, Congress had exercised its powers under § 5 of the Fourteenth Amendment rather than under the commerce clause. 567 F.2d at 1270-1271.

The recent *Arritt* decision is controlling in this case. As the Fourth Circuit there held, the 1974 amendments to the ADEA are not unconstitutional. Thus, the City of Baltimore is subject to the provisions of the ADEA, and if a city ordinance conflicts with provisions of this Congressional statute, the ordinance in question must fall.[6]

V

Waiver

Defendants next argue that even if the City of Baltimore and its Fire Department are subject to the provisions of the ADEA, the plaintiffs waived their right to rely on benefits conferred upon them by this Act when they voluntarily became members of the FPERS in 1962 or thereafter. In support of this contention, defendants assert that five of the plaintiffs contractually agreed to retire at age sixty when they became members of the FPERS.

In 1925, the City of Baltimore established the first actuarially funded pension system in Maryland for the

[6] Other cases reaching the same conclusion include *Marshall v. Delaware River & Bay Authority*, 471 F. Supp. 886 (D. Del. 1979); *Remmick v. Barnes County*, 435 F. Supp. 914 (D.N.D. 1977); and *Usery v. Board of Education of Salt Lake City*, 421 F. Supp. 718 (D. Utah 1976).

general protection of municipal employees, known as "The Employees' Retirement System of the City of Baltimore" (the "ERS"). *See* Article 22, §§ 1-17, Baltimore City Code (as amended). That pension system, both then and now, contains a provision for mandatory retirement at age seventy. Both firefighters and policemen were covered by the ERS.

Following various studies supported by City firemen and their unions, a recommendation was made to the City Board of Estimates in 1960 that retirement benefits for members of the Fire Department should be liberalized. Following the enactment of enabling legislation by the State Legislature in 1961, an ordinance was introduced in 1962 before the Baltimore City Council, providing for the establishment of the Fire and Police Employees Retirement System (the "FPERS"). This legislation lowered the mandatory retirement age for firemen and police officers from age seventy to age fifty-five or sixty. A "grandfather clause" was included to permit firefighters, other than officers, who were in service on July 1, 1962 to continue to work until age sixty. Moreover, those in service on that date could, if they chose to do so, continue to be covered by the ERS. However, anyone who was employed after July 1, 1962 was required to retire at the age of fifty-five and was not permitted to be covered by the ERS. Officers of the Fire Department were permitted to continue until age sixty-five before being required to retire.

The proposed new ordinance was presented to the membership of both the Fire Department and the Police Department, and some 59% of the Fire Department personnel affected voted in favor of the new system. In June of 1962, the ordinance was passed by the City Council. Some members of the City Fire Department chose not to join the new system, but continued to be covered by the ERS. Others, including the plaintiffs, elected to become members of the FPERS. Plaintiffs Stern and Doyle joined the new system in 1962, while plaintiffs Robey and Paris did so in 1967. Plaintiff Johnson, in July 1962,

initially decided to remain in the ERS, but in June of 1963, he elected to become a member of the FPERS. Defendants contend that when the plaintiffs elected to become members of the new system, they waived any rights they might have under the ADEA and voluntarily agreed to retirement at age sixty.

Before a court can find that a federal right has been waived, it must be established that there was an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938). Courts indulge every reasonable presumption against waiver of fundamental rights, and a court cannot presume acquiescence in the loss of a fundamental right. *Id.* at 464, 58 S. Ct. at 1023.

These principles were recently applied by the Supreme Court in a case presenting the question of a claimed waiver of an employee's rights under Title VII of the Civil Rights Act of 1964. *See Alexander v. Gardner-Denver Company*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974). In that case, the Supreme Court concluded that there could be no prospective waiver of an employee's rights under Title VII. Noting that an individual's right to equal employment opportunities represented a congressional command that each employee be free from discriminatory practices, the Supreme Court pointed out that waiver of such a right would result in defeating the paramount Congressional purpose behind Title VII. 415 U.S. at 51-52, 94 S. Ct. at 1021. Accordingly, the Supreme Court concluded that an employee's rights under Title VII are not susceptible of prospective waiver.

These principles are equally applicable here. Plaintiffs made their decisions to join the FPERS in 1962, 1963 and 1967. The ADEA was enacted by Congress in 1967, but it was not until 1974 that employees of state and local governments were included within provisions of the statute. In 1978, the law was again amended to preclude the involuntary retirement of an individual because of age

pursuant to an established pension plan or seniority system. Under these circumstances, it can hardly be concluded that plaintiffs waived their rights under the ADEA by joining the FPERS between 1962 and 1967. In those years, they had no right to challenge provisions of the FPERS which required them to retire at age sixty or fifty-five, and therefore there was no known right for them to relinquish when they decided to join the new retirement system. Under federal standards, one may not relinquish intentionally an unknown right. *Nelson v. Peyton,* 415 F.2d 1154, 1158 (4th Cir. 1969), *cert. denied,* 397 U.S. 1007, 90 S. Ct. 1235, 25 L. Ed. 2d 420 (1970); *Dodge v. Turner,* 274 F. Supp. 285, 289 (D. Utah 1967); *see Walker v. Peppersack,* 316 F.2d 119, 127-28 (4th Cir. 1963).

This Court's conclusion that plaintiffs have not waived their rights under the ADEA is supported by the Fourth Circuit's opinion in *McMann v. United Air Lines, Inc.,* 542 F.2d 217 (4th Cir. 1976). In that case, the Court placed no significance on the fact that the plaintiff could have chosen not to join the retirement plan claimed to violate the ADEA. 542 F.2d at 219, n.1.

Nor is there merit to defendants' argument that plaintiffs are bound contractually to retire at ages sixty or fifty-five because they have agreed to the terms of the FPERS. A similar contention was rejected by Judge Miller of this Court in *Chastang v. Flynn & Emrich Co.,* 365 F. Supp. 957 (D. Md. 1973). There, the argument had been made that the plaintiffs had waived their Title VII rights by executing releases. Judge Miller held that a statutory right "conferred upon a private party, but affecting the public interest may not be waived or released, if such waiver or release contravenes the statutory policy." 365 F. Supp. at 968. The same principles are applicable here.

For these reasons, this Court finds and concludes that the plaintiffs did not waive or surrender their rights under the ADEA when they joined the FPERS at various times between 1962 and 1967.

VI

The bona fide occupational qualification defense

The principal issue presented in this case and the one to which most of the evidence has been directed is whether age is a bona fide occupational qualification (hereinafter "BFOQ") for Baltimore City firefighters. This defense is specifically recognized by § 623(f)(1), which permits an employer to take any action otherwise prohibited by the Act where age is a bona fide occupational qualification "reasonably necessary to the normal operation of the particular buisness * * *" Relying on this statutory provision, defendants contend that the Act is not violated by provisions of the Baltimore City Code which require that five of the plaintiffs retire at age sixty, whether or not they wish to do so.[7]

(a) *Prima facie case*

Plaintiffs initially have the burden of establishing that their rights under the ADEA have been violated. A *prima facie* case of age discrimination is made out where a plaintiff proves (1) that he is a member of the protected group; (2) that he has been terminated; (3) that he has been replaced by a person outside the protected group; and (4) that he was qualified to do the job. *Marshall v. Baltimore & Ohio Railroad Company,* 461 F. Supp. 362, 372 (D. Md. 1978), *aff'd in part and rev'd in part, EEOC v. Baltimore & Ohio Railroad Company,* 632 F.2d 1107 (4th Cir. 1980).

In this case, there is little doubt that plaintiffs have fully satisfied this burden and have established a *prima facie* case under the ADEA. Plaintiffs, who are over sixty

[7] This portion of the Opinion (Section VI) will discuss only the claims of the five plaintiffs who are presently over sixty years of age. Accordingly, the term "plaintiffs", as used in this Section, refers to all plaintiffs except Porter, whose claim will be discussed hereinafter. The term "firefighters" as used herein, includes emergency vehicle drivers and pump operators.

years of age, are members of the group protected by the Act. The employment of plaintiff Johnson has in fact been terminated, and the other plaintiffs would have been involuntarily terminated had this Court not entered a Temporary Restraining Order which continued their employment. Had the employment of the plaintiffs been terminated under the FPERS, younger persons would have taken their place. Finally, the evidence discloses that the plaintiffs, despite their age, are fully qualified to perform their duties as Baltimore City firefighters. No evidence to the contrary has been presented. Rather, the record in this case clearly establishes that plaintiffs' performance of their duties has been more than satisfactory.

For these reasons, this Court finds and concludes that plaintiffs have made out a *prima facie* case of age discrimination under the ADEA. As applied to them, the provisions of § 34(a) which require that they retire involuntarily at age sixty violate the ADEA, unless defendants can prove that their acts under the Ordinance are not unlawful pursuant to § 623(f)(1).

(b) *Defendants' burden*

Once a plaintiff has made out a *prima facie* case of age discrimination under the ADEA, the burden shifts to the employer to establish a BFOQ defense. *Arritt v. Grisell, supra; Houghton v. McDonnell Douglas Corporation,* 553 F.2d 561, 564 (8th Cir.), *cert. denied,* 434 U.S. 966, 98 S. Ct. 506, 54 L. Ed. 2d 451 (1977).[8] In *Arritt,* the Fourth Circuit rejected the standard adopted by the Seventh Circuit in *Hodgson v. Greyhound Lines, Inc.* 499 F.2d 859 (7th Cir. 1974), *cert. denied,* 419 U.S. 1122, 95 S. Ct. 805, 42 L. Ed. 2d 822 (1975), for measuring the burden assumed by the employer when a *prima facie* case of age discrimination has been made out. Rather, the Fourth Circuit adopted the two-pronged test formulated in *Usery*

[8] In the *Houghton* case, the Eighth Circuit concluded that the employer's admission that the plaintiffs removal was solely on the basis of his age presented a *per se* violation of § 623(a).

v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976). Thus, in this case, the defendants have the burden to show (1) that the BFOQ which it invokes is "reasonably necessary to the essence of its business" of operating an efficient fire department within the City of Baltimore, and (2) that defendants have "reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class * * * would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis." 567 F.2d at 1271. In this case, the class involved includes all Baltimore City firefighters, other than officers, who are sixty but not yet sixty-five years of age. Defendants here must prove that there is a factual basis for believing that all or substantially all Baltimore City firefighters between sixty and sixty-five are unable to perform their duties safely and efficiently, or that Baltimore City firefighters between those ages may not possibly or practically be dealt with on an individualized basis.

In considering whether defendants have in this case met their burden of establishing a BFOQ defense, this Court must be guided by the objectives which Congress had in mind when it enacted the ADEA. Congress went so far as to expressly incorporate into the statutory language itself its findings that older workers find themselves disadvantaged in their efforts to retain employment, that the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and that the employment problems of older workers are grave. § 621(a). Congress further expressly stated that the purpose of the ADEA is to promote the employment of older persons based on their ability rather than their age, to prohibit arbitrary age discrimination in employment and to assist employers and workers in finding ways to meet problems arising from the impact of age on employment. § 621(b).

Recent opinions discussing the BFOQ defense asserted by an employer under § 623(f)(1) indicate that the burden imposed on a defendant of establishing this affirmative defense is a substantial one. In *Houghton v. McDonnell Douglas Corporation, supra,* the Eighth Circuit reversed the finding of the District Court that the employer of a test pilot had properly terminated his employment at age fifty-two, because age was a BFOQ for test pilots. Citing *Weeks v. Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228, 235 (5th Cir. 1969), the Eighth Circuit concluded that to uphold the District Court's finding that defendant had met its burden in that case would allow the BFOQ exception to swallow the rule. 553 F.2d at 564. In *EEOC v. City of St. Paul,* 500 F. Supp. 1135, 1146 (D. Minn. 1980), the Court, in concluding that age was not a BFOQ for fire chiefs of the City of St. Paul, noted that Congress "apparently intended that the bona fide occupational qualification be very narrowly construed, and thus applicable in very few cases. *See* 29 C.F.R. § 860.102 (1980)." In *Sexton v. Beatrice Foods Co.,* 630 F.2d 478, 486 (7th Cir. 1980), the Seventh Circuit, in considering § 623(f)(2), observed that exceptions of this sort to a remedial statute are to be narrowly and strictly construed.

(c) *Discussion*

On the record here, this Court finds and concludes that defendants have not met their burden of proving under § 623(f)(1) that age constitutes a BFOQ for the requirement of § 34(a) that the plaintiffs retire at age sixty. Defendants have not convinced this Court that the retirement of City firefighters at that age is reasonably necessary for the operation of an efficient fire department within the City of Baltimore. Furthermore, defendants have not shown, on this record, that there is a factual basis for them to believe that all or substantially all Baltimore City firefighters between the ages of sixty and sixty-five, other than officers, would be unable to perform their duties safely and efficiently. Finally, defendants have not proved that it is impossible or impractical to deal

with firefighters between sixty and sixty-five on an individualized basis.

In attempting to meet their burden, defendants first emphasize the arduous nature of firefighting duties and the physical demands of the job. They point out that the duties of firefighters include periods of relative inactivity followed by those of intense physical activity. During a fire, plaintiffs and other firefighters are exposed to intense heat (or in winter, extreme cold), must work in smoke-filled environments in the presence of toxic substances and must perform their duties under great stress.

In the absence of other evidence in the record, these facts might have significance. However, when the record as a whole is considered, this Court is satisfied that defendants have not met their burden of proving that all or substantially all employees of the Baltimore City Fire Department cannot safely and efficiently perform their demanding duties between the ages of sixty and sixty-five.

Insofar as five of the plaintiffs are concerned, this case involves their performance for a period of only five years, namely their ability to perform their duties adequately at ages sixty through sixty-four inclusive. Plaintiffs are not here challenging the right of the defendants to require their mandatory retirement at age sixty-five. That is the age when officers of the Fire Department must retire, and plaintiffs are not contending that they have the right under the ADEA to work as firefighters beyond that age.[9] For these reasons, nothing in this Opinion should be construed as deciding whether the City of Baltimore has the right to require the mandatory retirement of Fire Department employees at age sixty-five.

[9] Indeed, plaintiffs' evidence indicates that officers regularly perform at fires the same duties as firefighters of lesser rank and, conversely, that firefighters undertake officers' duties in the absence of the latter. Essentially, plaintiffs are seeking in this case the same mandatory retirement age that the City applies to officers of the Fire Department.

The starting point in evaluating the job performance of Baltimore City firefighters after age sixty is the manner in which the plaintiffs themselves have performed since they attained that age. The evidence is overwhelming that plaintiffs have not only performed satisfactorily since they became sixty, but in most instances their performance has been more than satisfactory and even exceptional. Plaintiff Johnson is sixty-two years of age, plaintiffs Stern and Doyle are sixty-one and plaintiffs Paris and Robey are sixty. The evidence presented indicates that all five of these plaintiffs are today as qualified as younger employees of the Department to perform their duties as firefighters. Indeed, defendants have not sought to introduce any evidence to indicate that any one of the plaintiffs cannot carry out his assigned duties because of physical or other reasons. One Fire Department Captain testified that advancing age had not adversely affected plaintiff Stern's performance, and another Captain characterized Stern as being an "exceptional" firefighter today. Stern was rated as "outstanding" in his 1979-1980 performance evaluation report. Other evidence indicated that other plaintiffs were "good", "effective" or "very efficient" in the performance of their firefighting duties.

The testimony of firefighter Grove (who is not a plaintiff) supports that of the plaintiffs and of the Fire Department officers who evaluated plaintiffs' performances. Grove is sixty-nine years of age and will have been with the Department for thirty-nine years when he retires in August of 1981 at age 70.[10] In a three-alarm fire that occurred in January 1981, Grove performed arduous firefighting duties over a period of four hours without difficulty. His testimony and that of the plaintiffs themselves supports this Court's findings on this record (1) that plaintiffs have performed their firefighting duties satisfactorily since they became sixty, and (2) that they may be

[10] Grove chose to remain a member of the ERS and is therefore not required to retire under City law until he becomes seventy years of age.

expected to continue to so perform until they reach the age of sixty-five.[11]

Defendants' argument that substantially all Baltimore City firefighters would be unable at age sixty to perform their duties safely and efficiently is undercut by the fact that historically Baltimore firemen have always worked past that age and even up to age seventy. As discussed hereinabove, the ERS, established in 1925, did not require retirement until the age of seventy. Even when the FPERS became effective in 1962, many firefighters, like the witness Grove, chose to remain covered by the earlier system and, like Grove, have continued to perform their duties satisfactorily after they reached the age of sixty. This continued employment of firefighters beyond the age of sixty has in no way affected the high caliber of the services performed by the Baltimore City Fire Department. As Chief O'Connor testified, the Baltimore City Fire Department, prior to 1962, was rated as one of the best in the country, and it continues to be so rated. It is difficult to understand how such a rating could have been achieved if all or substantially all of the Department's firefighters over the age of sixty cannot now and could not for many years in the past perform their duties safely and efficiently.[12]

The further question raised is why an effort was not made at an earlier date to fix a retirement age of sixty, if the risk to the public was as great as defendants now contend. If anything, the burdens undertaken by an older firefighter are less today than they were in prior years. In 1953, firefighters worked a 66-hour week, but this has been reduced over the years to the present 48-hour week. Moreover, technological improvements over the years,

[11] Plaintiff Robey was actively engaged in fighting a major fire between 12:00 midnight and 7:00 A.M. on April 24, 1981, which was only three days before this case came on for trial.

[12] At the present time, there are eight City firefighters who are between the ages of sixty and seventy, and sixty-five who are between the ages of fifty-five and fifty-nine.

including in particular the widespread use of oxygen breathing apparatus,[13] have made the job less onerous for both older and younger members of the Department.

Defendants' selection of the arbitrary age of sixty for the mandatory retirement of Baltimore firefighters is particularly suspect in view of what other municipal fire departments have done. A survey of the mandatory retirement ages of fire department personnel in thirty of the largest cities in the United States indicates that only four cities have a mandatory retirement age of sixty. Twenty-two cities have a retirement age of sixty-five or older or have no mandatory retirement age at all for firefighters.[14] Nothing in the record indicates that Baltimore Fire Department personnel perform duties any more arduous than those undertaken in other cities. To accept defendants' contention that substantially all firefighters above age sixty cannot safely and effectively perform their duties would indicate that a large number of fire departments across the country are inadequately or improperly manned.

Defendants rely very heavily in this case on the medical evidence they have produced. Defendants argue that disease processes in persons aged fifty-five or older preclude the safe and efficient performance of their duties by firefighters over that age and that these medical conditions cannot be ascertained by means other than knowledge of the individual's age. It is asserted that the mandatory requirement of City law that firefighters retire at age fifty-five or sixty is based on sound physiological and medical data and is the most reliable way to remove firefighters with coronary disease from the Fire Department. Defendants contend that the expert testimony

[13] This apparatus is designed to protect firefighters from smoke, carbon monoxide and other harmful gases at the scene of a fire.

[14] Three cities require retirement at age sixty-three or sixty-four. Baltimore was the only city with a fifty-five year old retirement age for firefighters.

presented by them proves that it is impossible or highly impractical to deal with the retirement of Baltimore City firefighters over sixty on an individualized basis.

On the record here, this Court finds and concludes that defendants have not met their burden of proving that it is impossible or highly impractical to deal with the retirement of Baltimore City firefighters between the ages of sixty and sixty-five on an individualized basis. As to this issue, the expert testimony presented by plaintiffs was much more convincing than that of defendants. In particular, this Court found Dr. Samuel M. Fox, III to be a most impressive witness, and his testimony will be credited in substantial part. Dr. Fox is an experienced cardiologist who specializes in exercise testing.[15] He testified that the chronological age of an individual must of course be considered but that it is not determinative of that individual's ability to perform duties such as those required of a firefighter. Rather, exercise tolerance tests, supplemented by other tests and procedures if necessary, should be and can be used to determine whether a firefighter is physically and medically fit to perform his duties. Because of technological improvements in recent years, physicians can today much more readily test for cardiological problems which a fireman or other similar worker might have.

The testimony of Dr. Fox is supported by that of both Dr. Paul O. Davis[16] and Dr. Ellsworth R. Buskirk.[17] Neither of these witnesses is a physician, but both have extensive experience in exercise physiology. This Court accepts their

[15] Dr. Fox is a Professor of Medicine at Georgetown University School of Medicine, was formerly a member of the President's Council on Physical Fitness and Sports and is a past President of the American College of Cardiology. These are only a few of his many accomplishments.

[16] Dr. Davis is particularly well qualified to testify concerning the duties required of a firefighter. He has been an active member of the Takoma Park (Md.) Fire Department since 1966.

[17] Dr. Buskirk is a Professor of Applied Physiology at The Pennsylvania State University.

testimony that age should not be the determining factor in ascertaining whether an individual between sixty and sixty-five is capable of performing physical tasks such as those required of a firefighter.[18] These witnesses conceded that increasing age unquestionably has an effect on physical performance and that aerobic capacity decreases with age.[19] But decreasing physical ability is offset by the experience and knowledge which an older employee has gained over the years. An older, more experienced firefighter is better equipped to pace himself and is more knowledgeable concerning unnecessary risks than the younger. Indeed, the evidence in this case indicates that younger firefighters receive more physical injuries than do older ones, apparently because younger firefighters assume more unnecessary risks.

Plaintiffs' expert witnesses also readily concede that firefighters as a class are particularly subject to heart disease and that the risk of heart disease increases with age. But facts such as these do not under the ADEA permit defendants to stereotype City firefighters between the ages of sixty and sixty-five and conclude that all or substantially all of them are no longer capable of performing their assigned duties safely and efficiently. As the Court said in *Aaron v. Davis,* 414 F. Supp. 453 (E.D. Ark. 1976), at page 461:

> Generally, it is the relative ease with which possibly incapacitating defects are detectable that determines whether the qualifications imposed by the employer are job-related or "reasonably necessary to the normal operation of the particular business," as provided in the Act. In this area, a claim for exemption from the statute's proscriptions will not be permitted on the

[18] It was Dr. Davis' opinion that it is both possible and practical to determine plaintiffs' capacity and ability to continue to perform their jobs safely and efficiently by means of medical examinations, periodic reviews of current job performance and other objective tests.

[19] After age seventy, deterioration in physical performance is more rapid. This fact has little significance in this case.

> basis of the employer's *stereotyping assumption* that most, or even many, employees in a particular type of job become physically unable to perform the duties of that job after reaching a certain age. *See Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969). (Emphasis added)

The ADEA recognizes that stereotyping assumptions of an employer are not acceptable unless it is impossible or highly impractical to deal with members of a given class on an individualized basis. As the testimony of plaintiffs' experts indicate, it is both possible and practical to determine whether an individual firefighter between the ages of sixty and sixty-five is physically disabled from performing his assigned duties. In most cases, the cost of such testing is not great, and some of this cost will be paid under the Fire Department Health Care Program. Conventional risk factors can first be determined by way of interviews, and, in many instances where recognized risk factors are absent, further testing would not be required. Where indicated by the presence of one or more risk factors, a firefighter sixty years of age or older can take an exercise tolerance test (also referred to in testimony as an exercise stress test). As Dr. Fox testified, this is not an expensive test, and more expensive and more invasive testing mechanisms need be employed only in those instances where it is indicated that follow-up testing is required.[20]

The expert testimony relied upon by the defendants was less convincing than that of the plaintiffs. Neither Dr. Albert M. Antlitz nor Dr. Earl W. Ferguson has the experience that Dr. Fox has had in both cardiology and exercise tolerance testing. In his testimony, Dr. Antlitz indicated that he himself had examined a sixty-three year old officer of the Fire Department to determine whether that individual should be retired. Following his examination of sixty-three year old Fire Lieutenant Anthony V.

[20] These more expensive and more invasive follow-up tests include radionuclide imaging and cardiac catheterization.

Herr in 1978, Dr. Antlitz concluded that the cardiac status of this Fire Department officer, who had stopped working because of hypertension, would permit him to engage in his usual work as an officer with a truck company. However, at the trial, Dr. Antlitz testified that since 1978 he had learned what lieutenants now do in fire companies and that today he would not let Lt. Herr go back to fighting fires at age sixty-three. Thus, defendants' own evidence indicates that Fire Department personnel with cardiac problems can be evaluated on an individualized basis and retired if necessary. Other evidence in the record shows that examinations of the sort described by Dr. Antlitz (and testing, if necessary) could be successfully performed for plaintiffs and other firefighters between sixty and sixty-five years of age.

Dr. Alexander R. Lind, a physiologist called to testify by defendants, based his conclusion that substantially all firefighters over fifty-five could not properly perform their duties in large part on his study of miners in South Africa.[21] Such individuals hardly composed an appropriate class for comparison with Baltimore City firefighters, since all of the miners studied were black and worked full eight-hour shifts in mines where it was very humid and where the temperature ranged from 85° to 100°.

What the ADEA requires in a case involving municipal workers like firefighters is a balancing of the right of each individual employee to continue to work in spite of his age against the risk to the public and to other employees created by the nature of the duties to be performed. As the Court said in *Aaron v. Davis, supra,* at 461:

> It is apparent that the quantum of the showing required of the employer is inversely proportional to the degree and unavoidability of the risk to the public

[21] Dr. Lind testified in *Houghton v. McDonnell Douglas Corporation, supra.* In reversing the District Court's conclusion that defendant had met its burden in that case, the Eighth Circuit characterized the Company's evidence as being "of a general nature."

> or fellow employees inherent in the requirements and duties of the particular job. Stated another way, where the degree of such risks is high and methods of avoiding same (alternative to the method of a mandatory retirement age) are inadequate or unsure, then the more arbitrary may be the fixing of the mandatory retirement age.

In support of its conclusions in this case, this Court would cite and rely on both *Aaron v. Davis, supra* and *EEOC v. City of St. Paul, supra*. Both of those cases dealt with the rights of firefighters under the ADEA. In *Aaron*, an ordinance of the City of Little Rock required that all members of the fire department retire at age sixty-two. Following a trial, Chief Judge Eisele concluded that the record did not support the special relevance of the age sixty-two mandatory retirement requirement of the Little Rock ordinance. Accordingly, the Court held that the provisions of the ordinance in question were arbitrary, capricious and wholly lacking in any justifiable business necessity. 414 F. Supp. at 463.

In *City of St. Paul, supra*, a Minnesota statute and an ordinance of the City of St. Paul had established a mandatory retirement age of sixty-five for all uniformed fire department employees. Following a trial, District Judge Alsop held that provisions of this legislation requiring Fire Chiefs to retire at age sixty-five violated the ADEA. Noting that the only Chief over age sixty-four about whom testimony had been presented could adequately perform his duties, the Court found that the evidence in the case did not give the City of St. Paul a factual basis for believing that substantially all Chiefs were unable to perform their duties safely and efficiently after the age of sixty-four. 500 F. Supp. at 1145.

In *City of St. Paul*, the Court upheld the challenged legislation insofar as it required the retirement of firefighters and captains at age sixty-five. 500 F. Supp. at 1144. Defendants argue that this part of the decision supports their contention that age is a BFOQ for firefighters. This

Court would disagree. There is no inconsistency between this Court's decision that defendants have not on the record here met their burden of proving that retirement at age sixty is a BFOQ for firefighters and Judge Alsop's conclusion that the defendants in *City of St. Paul* had met their burden concerning such compulsory retirement at age sixty-five. Certainly as an employee's age increases, there is a decrease in the quantum of proof necessary for an employer to meet its burden of proving a BFOQ under § 623(f)(1). *Aaron v. Davis, supra* at 461. Plaintiffs have not in this case (as did the plaintiffs in *City of St. Paul*) sought to work beyond age sixty-five. Nothing contained herein is intended to suggest that Baltimore firefighters could not be required by the City to retire at age sixty-five, since that question is not before the Court in this case. The issue here has been whether defendants have met their burden of proving that retirement at age sixty is a BFOQ for City firefighters. This Court finds that they have not.

In sum, the Baltimore City law in question, as applied to these plaintiffs and others like them, violates the ADEA because it sets an arbitrary age limit for terminating the plaintiffs' employment. As they have done all their lives, plaintiffs keenly wish to continue to work as firefighters until they are sixty-five. Section 34(a) does not permit plaintiffs' performance to be measured in terms of their ability. Rather, an arbitrary line has been drawn based on stereotyped assumptions. Plaintiffs have been told that solely because of their age, their services are no longer required. In this case, defendants have failed to meet their burden of proving that, when a firefighter becomes sixty, age is an occupational qualification reasonably necessary to the normal operation of the Baltimore City Fire Department. The provisions of § 34(a)(2) and (4) of Article 22 of the Baltimore City Code, as applied to plaintiffs and others like them, therefore violate the ADEA.

VII

The claim of plaintiff Porter

Plaintiff Porter is the only one of the six plaintiffs in this case who was not employed by the Fire Department on July 1, 1962. Under § 34(a)(2), he must therefore retire at age fifty-five. Defendants contend that since plaintiff Porter is presently thirty-two years of age, he is not a proper plaintiff in this suit.

Defendants argue that plaintiff Porter is not one of those persons protected by the ADEA, since the prohibitions of the Act are limited "to individuals who are at least forty years of age but less than seventy years of age."[22] 29 U.S.C. § 631. However, when read together with the rest of the statute, this provision does no more than define the acts prohibited by the statute and would not deprive plaintiff Porter of standing in this case. If Porter survives and is still employed by the Fire Department when he attains the age of fifty-five, he will clearly be protected by the Act. More importantly, since this Court has found that the provisions of § 34(a) which mandate retirement of a City firefighter at age sixty violate the ADEA, a *fortiori* the provisions of the legislation which mandate that plaintiff Porter must retire at age fifty-five are likewise invalid.

The essential question which must be addressed in determining whether plaintiff Porter has standing is whether his claim is now ripe for adjudication. Defendants assert that since Porter will not have to retire until the year 2003, his claim is too speculative to be considered by this Court at this time. Relying on *Eccles v. Peoples Bank*, 333 U.S. 426, 68 S. Ct. 641, 92 L. Ed. 2d 784 (1948), defendants argue that there are many contingent events which might occur before plaintiff Porter is required to retire, and that the occurrence of any one of these events would render moot any decision made by this Court as to him.

[22] The 1978 amendments to the Act increased the top age limit from sixty-five to seventy.

When the legislation in question is considered from a practical point of view, this Court concludes that abstract concepts of justiciability should be disregarded. This suit challenges provisions of § 34(a) of Article 22 of the Baltimore City Code. Two groups of employees are affected by the legislation, those who joined the Fire Department prior to July 1, 1962 and those who, like plaintiff Porter, began their employment after that date. The provisions of the law applying to these two separate groups are hardly severable. Quite obviously, if the ADEA invalidates provisions of the City Code which require mandatory retirement of a firefighter at age sixty, that Act likewise invalidates similar provisions mandating retirement at age fifty-five. The principle of statutory severability plays a special role when a court is presented with questions of ripeness. *See* Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3532 at 258 (1975). Inseverability, therefore, may make ripe issues that otherwise would be better deferred. *Id.* at 259; *see Carter v. Carter Coal Company*, 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936). As the Court of Appeals of Maryland said in *Heubeck v. Mayor and City Council of Baltimore*, 205 Md. 203, 211, 107 A.2d 99 (1954), an Act must fall entirely if the effect of declaring a portion of it invalid would render the remainder incapable of effecting the purpose for which the Act was enacted.

Under the particular circumstances of this case, considerations of judicial economy lead this Court to the conclusion that plaintiff Porter's claim is ripe for determination at this time. It would make little sense, in view of the findings and conclusions made herein, to defer consideration of Porter's claim until a later date. Accordingly, plaintiff Porter is entitled to a declaratory judgment and injunction prohibiting defendants from enforcing provisions of § 34(a) which mandate that he must retire at age fifty-five.

VIII

Plaintiffs' other claims

In view of this Court's conclusion that § 34(a)(2) and (4) of Article 22 of the Baltimore City Code violates provisions of the ADEA, it is not necessary to determine whether this City law likewise contravenes 42 U.S.C. § 1983 and the Fourteenth Amendment. However, it should be noted that the Fourth Circuit's decision in *Arritt v. Grisell, supra*, makes it very doubtful that plaintiffs would prevail insofar as their alternative claims are concerned.

In the second part of the *Arritt* opinion (567 F.2d 1271-1272), the Fourth Circuit upheld the District Court's granting of summary judgment in favor of the defendants as to plaintiff's claim that the West Virginia statute violated § 1983 by denying the plaintiff's right to the equal protection of the laws. Relying on *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976), the Fourth Circuit concluded that it could not be said that the age limitation contained in the West Virginia statute did not rationally further a legitimate state purpose insofar as the claim based on the equal protection clause, as distinguished from the statutory claim under the ADEA, was concerned. As Judge Thomsen pointed out, there is no inconsistency in concluding that a statute violates the ADEA but does not violate the Equal Protection Clause of the Fourteenth Amendment, since legislation "authorized by § 5 of the Fourteenth Amendment can prohibit practices which would pass muster under the Equal Protection Clause, absent an act of Congress." 567 F.2d at 1272.

In any event, in this case, it is not necessary to consider in detail the arguments presented by the plaintiffs in seeking to distinguish this case from *Arritt* and *Murgia*. Plaintiffs are entitled to the relief they seek under the ADEA, and there is therefore no need for this Court to go on and undertake to analyze the evidence in terms of plaintiffs' claims asserted under § 1983 and the Fourteenth Amendment.

IX

Conclusion

For the reasons stated, plaintiffs are entitled to the relief they seek. Plaintiff Johnson is entitled to a judgment in the amount of $1,000.00, representing back pay due him from May 1 to June 11, 1979. All plaintiffs are entitled to a declaratory judgment, a permanent injunction and costs. In addition, plaintiffs are entitled to attorneys' fees in an amount to be determined by the Court at a later date. Counsel should meet and undertake to agree on the form of an Order to be entered herein.

APPENDIX B

In The United States District Court for The District of Maryland

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Civil No. H-79-998

Robert W. Johnson, et al.,

Plaintiffs,

and

Equal Employment Opportunity Commission,

Intervening Plaintiff

v.

Mayor & City Council of Baltimore, et al.,

Defendants

JUDGMENT AND DECREE

(Filed: 13th of August, 1981)

Pursuant to the findings of fact and conclusions of law set forth in the Opinion of June 9, 1981, entered in this case, it is this 13th day of August, 1981, by the United States District Court for the District of Maryland,

ORDERED, ADJUDGED AND DECREED:

1. That the provisions of Section 34(a)(2) and (4) of Article 22 of the Baltimore City Code (1976 Edition, 1980 Cumulative Supplement) of the Fire and Police Employees Retirement System of the City of Baltimore requiring the Plaintiffs and other employees of the Baltimore City Fire Department (including, but not limited to, firefighters, emergency vehicle drivers, pump operators, fire apparatus

technicians, marine engineers, cardiac rescue technicians, emergency medical technicians, fire communications technicians and emergency equipment maintenance technicians) who are members of the Fire and Police Employees Retirement System to be retired at age 55 or at age 60 are violative of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C., Section 621, et seq., and are hereby declared invalid as applied to such persons.

2. That Defendants, their agents, servants and employees are permanently enjoined from requiring the retirement of the Plaintiffs and other Baltimore City Fire Department employees like them (including, but not limited to, firefighters, emergency vehicle drivers, pump operators, fire apparatus technicians, marine engineers, cardiac rescue technicians, emergency medical technicians, fire communications technicians and emergency equipment maintenance technicians) at ages 55 and 60.

3. That judgment be and is hereby entered in favor of the Plaintiff, Robert W. Johnson, against the Defendant, Mayor and City Council of Baltimore, in the amount of One Thousand Dollars ($1,000.00), this amount is deemed to be unpaid minimum wages and overtime compensation.

4. That the Defendants be and are hereby required to grant to the Plaintiff, Robert W. Johnson, the period from April 30, 1979 to June 11, 1979 as "creditable service" within the meaning of Section 32 of Article 22 of the Baltimore City Code, as aforesaid.

5. That the Court finds that counsel fees in the amount of $45,315.00 and costs in the amount of $8,804.08 shall be paid by the Defendant, Mayor and City Council of Baltimore to counsel for the Plaintiffs for services rendered and costs incurred through July 31, 1981, and the Court, finding these amounts to be just and fair, incorporates them as part of this Judgment and Decree.

ALEXANDER HARVEY,
United States District Judge.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

BALTIMORE, MARYLAND 21201

Alexander Harvey II
Judge

September 14, 1981

William H. Engelman, Esq.
Sun Life Building, 10th Floor
Baltimore, Maryland 21201

Ambrose T. Hartman, Esq.
Deputy City Solicitor
101 City Hall
Baltimore, Maryland 21202

Re: Johnson, et al. v. Mayor & City Council, et al. — Civil No. H-79-998

Gentlemen:

Defendants have now filed a motion for reconsideration in this case. Plaintiffs filed an opposition to this motion. After a review of the pleadings and of this Court's opinions in this case, I have decided, pursuant to Local Rule 6, that no hearing is necessary for a decision on the pending motion. This Court concludes that there is no merit to the pending motion and that it should be denied.

Following a trial on the merits, this Court filed a 28-page written opinion on June 9, 1981. The Court found that the plaintiffs were entitled to the relief they sought, and were also entitled to attorneys' fees and costs. That opinion has now been published in 515 F. Supp. 1287 (D. Md. 1981).

When counsel were unable to agree on the form of a Final Order, further memoranda and supporting papers were filed by both sides. In a 12-page Memorandum and Order filed on August 13, 1981, the Court granted

plaintiffs' application for attorneys' fees and costs. That same day, a Judgment and Decree was entered, awarding, *inter alia*, plaintiffs counsel fees in the amount of $45,315.00 and costs in the amount of $8,804.08.

In their motion for reconsideration, defendants do little more than reargue issues previously considered by this Court. The legal questions presented in this case were fully briefed and argued by counsel, both during the trial and in the post-trial memoranda. The arguments presented by defendants in support of the pending motion have previously been considered and rejected by the Court. This Court is satisfied that its previous rulings were correct, and the further arguments presented by defendants do not convince the Court that it should depart from any of these rulings.

Accordingly, defendants' motion for reconsideration of Judgment and Decree is hereby denied. An Order to such effect has been entered today.

Very truly yours,

ALEXANDER HARVEY, II,
United States District Judge.

cc: Deputy Clerk Michael

In The United States District Court
for the District of Maryland

Civil No: H-79-998

Robert W. Johnson, et al.,

Plaintiffs,

and

Equal Employment Opportunity Commission,

Intervening Plaintiff

vs.

Mayor and City Council of Baltimore, et al.,

Defendants

MOTION FOR RECONSIDERATION OF JUDGMENT AND DECREE

(Filed: 20th of August, 1981)

The defendants in the above-entitled case, pursuant to Rule 59 of the Federal Rules of Civil Procedure, respectfully request a reconsideration of the Court's Judgment and Decree entered August 13, 1981, and as grounds therefor say:

1. The Judgment and Decree is erroneous in holding that the mandatory ages of retirement of 55 and 60 required of members of the Fire and Police Employees Retirement System (F&P System) by Baltimore City violates the Age Discrimination in Employment Act of 1967 (ADEA) because any application of the Act to a state or its political subdivisions violates the 10th Amendment to the Constitution of the United States. For a recent case

decided by the Supreme Court of the United States in addition to those cited in the defendants' Pre-trial Brief, see *Pennhurst State School and Hospital, et al v. Halderman,* the U.S. Law Week, Volume 49, No. 41 (April 21, 1981) and the case of *EEOC v. State of Wyoming,* 514 F. Supp. 595 (1981).

2. The said Judgment and Decree of August 13, 1981 is erroneous in that by the weight of the expert testimony the defendants have established that there was a bona fide occupational qualification defense to the application of the ADEA to firefighters.

The Court, in its Opinion, gave great weight to the fact that very few cities require firemen to retire as early as 60. . . . (page 1 of 6)

Filed: 14th of September, 1981

Motion "Denied" this 14th day of September, 1981, for the reasons stated in the Court's letter to counsel of this date.

Alexander Harvey, U.S.D.J.

(Court's Stamp
affixed to page 1.)

APPENDIX D

In The United States District Court
for the District of Maryland

Civil No: H-79-998

Robert W. Johnson, et al.,

Plaintiffs

and

Equal Employment Opportunity Commission,

Intervening Plaintiff

vs.

Mayor and City Council of Baltimore, et al.,

Defendants

NOTICE OF APPEAL

Notice is hereby given that the Mayor and City Council of Baltimore, one of the Defendants above-named, appeals to the United States Court of Appeals for the Fourth Circuit from the Orders entered in this action on August 13, 1981 and September 14, 1981. Attached is a copy of the Defendant's letter to the Court Reporter dated July 15,

1981, requesting preparation of the transcript in this matter.

William Donald Schaefer,
Mayor.

Benjamin L. Brown,
City Solicitor

Ambrose T. Hartman,
Deputy City Solicitor

L. William Gawlik,
Assistant City Solicitor

Department of Law
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Attorneys for Defendant,
Mayor and City Council
of Baltimore

I HEREBY CERTIFY on this 30th day of September, 1981, a copy of the foregoing Notice of Appeal was mailed to William H. Engelman, Esquire, and Paul D. Bekman, Esquire, Sun Life Building, 10th Floor, Baltimore, Maryland 21201, attorneys for plaintiffs, and Frederick P. Charleston, Esquire, 711 West 40th Street, Room 210, Baltimore, Maryland 21211, attorney for Equal Employment Opportunity Commission.

Ambrose T. Hartman

APPENDIX E

United States Court of Appeals
Fourth Circuit

No. 76-2358

James C. Arritt, Appellant,

v.

Elwood G. Grisell, Robert W. Munn, James T. Campbell, as Members of the Police Civil Service Commission of the City of Moundsville, West Virginia and the City of Moundsville, West Virginia, a Municipal Corporation, Appellees.

Argued Oct. 4, 1977

Decided Dec. 28, 1977

Before Bryan, Senior Circuit Judge, and Winter, Circuit Judge, and Thomsen*, Senior District Judge.

Thomsen, Senior District Judge:

Appellant (plaintiff) applied for employment as a police officer in Moundsville, West Virginia. His application was denied by the City's Police Civil Service Commission on the sole ground that he was 40 years of age and therefore ineligible to take the required physical and mental examinations by reason of West Virginia Code (Michie 1976 Repl. Vol.) § 8-14-12, which establishes an 18-to-35 year age limit for applicants for original appointment to the police force of any city, such as Moundsville, with a

* Of the United States District Court for the District of Maryland, sitting by designation.

population of 10,000 or more. Plaintiff then brought this action against the City and the three members of its Police Civil Service Commission.

The first count, brought under § 7(b) of the Age Discrimination in Employment Act of 1967 (ADEA),[1] and § 16(b) of the Fair Labor Standards Act of 1938 (FLSA),[2] alleges that such denial of plaintiff's application constituted a violation of § 4(a)(1) of ADEA.[3] The second count, brought under the provisions of 42 U.S.C. § 1983, alleges a deprivation of equal protection rights guaranteed by the Fourteenth Amendment. Plaintiff seeks a permanent injunction compelling defendants to employ him as a police officer, unpaid wages resulting from his non-employment, compensatory damages, liquidated damages, attorney's fees and costs.

Defendants moved to dismiss the action on the ground that it did not state a cause of action upon which relief can be granted. They also answered the complaint, asserting the West Virginia statutory age limitation. Plaintiff then filed a motion for summary judgment, supported by an unsworn "statement of material facts not in dispute." Defendants filed an answer to the motion for summary judgment, supported by an affidavit of the Chief of Police of the City of Moundsville, and sought summary judgment in their favor or, in the alternative, a determination that plaintiff was not entitled to summary judgment because of the existence of a dispute over genuine issues of material facts.

At the hearing on those motions, the district judge denied plaintiff's request for leave to file a counter-affidavit or offer medical testimony, denied plaintiff's motion for summary judgment, and entered summary judgment in favor of defendants.

[1] 29 U.S.C. § 626(b).

[2] 29 U.S.C. § 216(b).

[3] 29 U.S.C. § 623(a)(1).

I. *Plaintiff's Claim under ADEA*

Defendants contend that the Supreme Court decision in *National League of Cities, et al. v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), invalidates the 1974 amendments[4] to § 11(b) of ADEA,[5] which extend coverage of the anti-discrimination provisions of 29 U.S.C. § 623(a), see note 3 above, to include state and local government employers.

National League of Cities held that the extension[6] of the minimum wage and overtime provisions of FLSA[7] to state and local government employees engaged in areas of traditional governmental functions could not be upheld as a constitutionally valid regulation of interstate commerce, because the Tenth Amendment limits exercise of the powers of Congress under the Commerce Clause.[8]

Defendants argue that ADEA is similarly grounded on the Commerce Clause, and that *National League of Cities* should therefore be construed as having declared unconstitutional all extensions to the states and their political subdivisions of the definition of "employer" in the 1974 amendments to FLSA, including those extensions affecting the equal pay and age discrimination provisions,[9] as well as the extension affecting the wage and hour

[4] Federal Labor Standards Amendments (FLS Amend.) of 1974, Pub. L. No. 93-259, 88 Stat. 55 (8 April 1974). *See* note 9 *infra*.

[5] 29 U.S.C. § 630(b).

[6] FLS Amend. of 1974, § 6(a)(1), which amended § 3(d) of FLSA (29 U.S.C. § 203(d)).

[7] 29 U.S.C. §§ 206(a), (b), 207(a).

[8] U.S. Const., art. I, § 8, cl. 3.

[9] Sec. 28(a) of FLS Amend. of 1974, 88 Stat. 74, amended § 11(b) of ADEA to include within the term "employer": " . . . (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States."

provisions. We note, however, that the Court limited its holding in *National League of Cities* to the commerce power, explicitly distinguishing "other section of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 or the Fourteenth Amendment" as sources of congressional authority that might support intrusions into integral state operations which the Tenth Amendment would prohibit if grounded on the Commerce Clause. *Id.*, at 852 n.17, 96 S. Ct. 2465.

In *Usery v. Charleston County School District, etc.*, 558 F.2d 1169 (4 Cir. 1977), decided after the decision below, we held that *National League of Cities* did not preclude application of the provisions of the Equal Pay Act of 1963[10] to state and local governments because, we held, unlike the statutory provisions considered in *National League of Cities*, the Equal Pay Act was an exercise of the power of Congress under § 5 of the Fourteenth Amendment.

Similarly, in the instant case, after considering the legislative history[11] and the Court's opinion in *Fitzpatrick*

[10] Pub. L. No. 88-38, 77 Stat. 56 (amending § 6(d)(1) of FLSA to prohibit sex-based wage differentiation), codified at 29 U.S.C. § 206(d)(1).

[11] H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967); S. Rep. No. 723, 90th Cong., 1st Sess., 13 (4 Nov. 1967) (Individual Views of Senator Javits); *Age Discrimination in Employment: Hearings* [Aug. 1-3, 15-17, 1967] *on Age Discrimination Bills Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor,* 90th Cong., 1st Sess. (23 Aug. 1967); *Age Discrimination in Employment: Hearings* [March 15-17, 1967] *on Age Discrimination Bills Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 90th Cong., 1st Sess. (26 April 1967). The similarity between ADEA and Title VII of the Civil Rights Act of 1964 (P.L. 88-352, 42 U.S.C. §§ 2000e-2000e-17) is not accidental. A proposal by Senator Javits to include discrimination on account of age in Title VII of the Civil Rights Act of 1964 was rejected, but § 715 of that Act directed the Secretary of Labor to make a study of the problem of age discrimination in employment; he made such a study and reported it to Congress. The 1966 amendments to FLSA, Pub. L. No. 89-601, in the bill which passed the Senate, included a provision to ban age discrimination in employment. That

v. Bitzer, 427 U.S. 445, 453-56, & 453 n.9, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976),[12] we conclude that in enacting ADEA and in extending it to the states Congress exercised its powers under § 5 of the Fourteenth Amendment.

Defendants' second line of defense to plaintiff's statutory claim was to assert the "bona fide occupational qualification" (bfoq) defense provided by§ 4(f)(1) of ADEA.[13] They supported this contention by filing an affidavit of the Chief of Police stating reasons in support of the age limitation. Plaintiff's motion for leave to file a counter-affidavit or to produce medical testimony was denied by the district court.

The district court adopted the standard applied in *Hodgson v. Greyhound Lines*, 499 F.2d 859 (7 Cir. 1974): that the employer need only demonstrate "a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of

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provision was eliminated by the Conference Committee; however, § 606 of P.L. 89-601 directed the Secretary to submit to the President "his specific legislative recommendations for implementing the conclusions" in his report. In his "Older Americans" message of January 23, 1967, President Johnson recommended to Congress passage of what became, after amendments, the ADEA of 1967. Speeches on the floor of both houses generally referred to the proposed ban on age discrimination in employment as being justified on bases similar to those supporting prohibitions already included in Title VII of the Civil Rights Act of 1964. *See* 113 Cong. Rec. 31254-57 (6 Nov. 1967); 113 Cong. Rec. 34738-55 (4 Dec. 1967). In 1972 Congress amended Title VII to extend coverage to the States as employers, and in 1974 Congress similarly amended ADEA. *See* S. Rep. No. 690, 93rd Cong., 2d Sess., 55 (22 Feb. 1974); H.R. Rep. No. 913, 93rd Cong., 2d Sess. (15 Mar. 1974). *See also* S. Conf. Rep. No. 758, 93rd Cong., 2d Sess. (28 Mar. 1974).

[12] "There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment. See, *e.g.*, H.R. Rep. No. 92-238, p. 19 (1971). Cf. *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 151 (1976)."

[13] 29 U.S.C. § 623(f)(1).

one more person than might otherwise occur under the present hiring practice." *Id.* at 863. We believe, however, that the proper standard is the two-pronged test formulated in *Usery v. Tamiami Trail Tours*, 531 F.2d 224 (5 Cir. 1976): that the burden is on the employer to show (1) that the bfoq which it invokes is reasonably necessary to the essence of its business (here the operation of an efficient police department for the protection of the public), and (2) that the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class (in our case, persons over 35 years of age) would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis. *Id.* at 236.[14] Since plaintiff was not afforded an opportunity to rebut the affidavit offered by defendants, the case must be remanded to give plaintiff such an opportunity.

We intimate no opinion whether some or all of the facts and conclusions set out in defendants' affidavit, if found to have been established after both sides have had an opportunity to develop a full factual record, are or are not sufficient to sustain defendants' burden under the test prescribed herein.

II. *Plaintiff's Claims under § 1983*

Plaintiff's other claim, based on 42 U.S.C. § 1983, that defendants' action violated his constitutional right to the equal protection of the laws, was also denied by the district court. We conclude, however, that the ruling of the district court on this point was justified by *Massachusetts*

[14] The court in *Tamiami* indicated that considerations of public safety were relevant to the question of what was reasonably necessary to the essence of the employer's business. 531 F.2d at 235-36. Although we do not presently decide the issue, it is suggested in Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380, 407 (1976), that this factor is equally relevant to the strictness by which the efficacy of the age requirement and the practicality of individualized screening are to be judged.

Board of Retirement, et al. v. Murgia, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976). In *Murgia*, the Court upheld a Massachusetts statute establishing a mandatory retirement age for uniformed state police officers,[15] against a challenge that if denied equal protection of the laws in violation of 42 U.S.C. § 1983.[16] Applying the holding of *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), the Court reaffirmed its ruling that an equal protection analysis requires strict scrutiny of a legislative classification only when that classification (a) impermissibly interferes with the exercise of a fundamental right or (b) operates to the peculiar disadvantage of a suspect class.

The age restriction on applicants for police officer in certain cities prescribed by the West Virginia statute involves neither situation. The claimed right to government employment is not *per se* a "fundamental right".[17] Nor can the establishment of a class of applicants for the position of police officer limited to persons between the ages of 18 and 35 years properly be considered suspect.[18] A class denoted only by age does not constitute a "discrete and insular minority,"[19] such as race, sex, or national origin. Persons subject to age-based classifications are not "saddled with such disabilities, or subjected to such a

[15] Mass. Gen. Laws, c. 32 § 26(3)(a) (1966): "Any [uniformed state police] officer . . . shall be retired by the state board of retirement upon his attaining age fifty. . . ."

[16] Plaintiff in *Murgia* made no claims under ADEA, inasmuch as the action arose prior to the 1974 amendments to ADEA. *See* 427 U.S. 307, 310 n.2, 96 S. Ct. 2562, 49 L. Ed. 2d 520.

[17] See *Rodriguez, supra; Lindsey v. Normet*, 405 U.S. 56, 73, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).

[18] *Compare*, e.g., *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971) (alienage); *McLaughlin v. Florida*, 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964) (race); *Oyama v. California*, 332 U.S. 633, 68 S. Ct. 269, 92 L. Ed. 249 (1948) (ancestry).

[19] *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938).

history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Rodrigeuz, supra*, 411 U.S. at 28, 93 S. Ct. at 1294. Since strict judicial scrutiny is not triggered by plaintiff's equal protection challenge under § 1983, rationality is the proper standard by which to determine whether the instant age classification violates equal protection. *Murgia, supra*, 427 U.S. at 312-14, 96 S. Ct. 2562.

Applying the rational basis standard, the *Murgia* Court found that compulsory retirement at age 50 was rationally related to futhering the legitimate interest identified by the state: "The purpose of the limitation was to protect the public by assuring the ability of state police to respond to the demands of their jobs."[20] In the instant case, as in *Murgia*, the primary function of the police is to protect persons and property and to maintain law and order. The State of West Virginia has a legitimate interest in assuring the physical preparedness of the police in Class I and II cities throughout the state. We cannot say that the 18-to-35 year age limitation imposed by West Virginia Code § 8-14-12 does not rationally further a legitimate state purpose, so far as the claim based on the equal protection clause, as distinguished from the statutory claim under ADEA, is concerned. Legislation authorized by § 5 of the Fourteenth Amendment can prohibit practices which would pass muster under the Equal Protection Clause, absent an act of Congress. Compare, e.g., *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), and *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), with *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

[20] 427 U.S. at 314-15 n.7, 96 S. Ct. at 2567.

APPENDIX F

United States District Court D. Wyoming

No. C80-0336B

Equal Employment Opportunity Commission,

Plaintiff,

v.

The State of Wyoming, et al., Defendants

May 22, 1981

MEMORANDUM OPINION

BRIMMER, District Judge.

The Equal Employment Opportunity Commission, as an agency of the United States (herein "EEOC"), sued the State of Wyoming, its Governor, and the members and directors of the Wyoming Game and Fish Commission, both as individuals and in their official capacities, the Director of the State of Wyoming Game and Fish Department, as an individual and officially, and the State of Wyoming Retirement System, on behalf of Bill Crump and others similarly situated, as a result of Crump's mandatory retirement at the age of fifty-five (55) years from his position of District Game Division Supervisor of the Wyoming Game and Fish Department. Its complaint alleges willful engagement by each of the Defendants in unlawful employment practices in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq. (herein referred to as "ADEA"), in that (a) Wyoming Statute § 31-3-107, entitled the Wyom-

ing State Highway Patrol and Fish Retirement Act, invalidly and contrary to ADEA permits mandatory retirement of a game warden at 55 years, (b) Crump was mandatorily retired at age 55, and (c) the policy of retiring game wardens at age 55 and other employees at age 65 is discriminatory and adversely affects numerous employees of the Wyoming Game and Fish Department. The Defendants moved to dismiss the complaint for failure to state a claim because: (1) ADEA cannot apply to a State's system for retirement of law enforcement personnel under the Tenth Amendment to the United States Constitution, citing *National League of Cities v. Usery*, 426 U.S. 833, 49 L. Ed.2d 245, 96 S. Ct. 2465 (1976); and (2) ADEA, even if passed under the Fourteenth Amendment, cannot apply here where there is no impermissible violation of that amendment's equal protection provisions.

The EEOC's prayer asked for injunctive and declaratory relief, and for reinstatement of Crump and sought "appropriate back wages and an equal sum as liquidated damages, in amounts to be proved at trial, to persons adversely affected by the unlawful employment practices . . . including Bill Crump and others similarly situated." No certification of the suit as a class action has yet been asked.

The naming of the Defendants in their individual capacities as well as officially disturbs the Court. EEOC has sued 9 citizens of this State as individuals for damages. It used the barest notice pleading, alleging only willful engagement by each of the Defendants in "unlawful employment practices." It affronts this Court's sense of justice and fair play that a federal agency should attack as individuals, the Governor of Wyoming and the Wyoming citizens who serve this State in a public-spirited capacity without pay as State Game and Fish Commission members, and attempt to extract an unspecified amount of damages from them without so much as a single specific allegation, statement or showing that they as individuals have acted with malice, or in bad faith, or have in some

way abused their offices so as to subject them to individual liability. The Defendants, as Governor, Director, and Commission members, are entitled to a qualified privilege or immunity from suit as individuals. *Smith v. Losee*,485 F.2d 334 (10th Cir., 1973). The EEOC complaint clearly has failed to state a cause of action against the Defendants as individuals. "The task of protecting the individual against the aggressions of government," as Prof. Archibald Cox has termed it,[1] falls to this Court and the Court therefore dismisses this action, sua sponte, against the Defendants as individuals.

The claims against the Defendants in their official capacity are in fact claims against the State of Wyoming. *Williams v.Eaton,* 443 F.2d 422, 428 (10th Cir., 1971), *Smyth v. Ames,* 169 U.S. 466, 518, 18 S. Ct. 418, 422, 42 L. Ed. 819, and the Defendants will hereafter be referred to collectively as the State of Wyoming or the State. In defense of this action the State contends that EEOC's claims against the State are based on an Act of Congress (the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.) passed under the Commerce Clause power of Congress, and are therefore an impermissible interference under the Tenth Amendment with the State of Wyoming under the authority of *National League of Cities v. Usery,* 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976). EEOC in reply contends that *National League of Cities v. Usery, supra,* merely struck down the minimum wage and overtime provisions of the Fair Labor Standards Act and did not affect the ADEA. It urges also that the extension of ADEA to State employees was a valid exercise of Congressional power under the Commerce Clause because the State's ability to establish age 55 for retirement of some of its employees in law enforcement work is not an attribute to its sovereignty, and finally that the Fourteenth Amendment provides a source of Congressional power supporting of ADEA's application to the States.

[1] Archibald Cox, *The Role of the Supreme Court in American Society,* 50 Marq. L.R. 575, 582 (1967).

A basic inconsistency in the United States' position is unusually striking. In the very recent case of *Thomas v. U.S. Postal Inspection Service,* 647 F.2d 1035 (10th Cir. 1981) the Court of Appeals confirmed that the Postal Service, ADEA notwithstanding, could fix minimum and maximum ages within which law enforcement officers may be employed. It relied upon the case of *Vance v. Bradley,* 440 U.S. 93, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979), which held that a requirement of retirement of Foreign Service personnel at age 60 was not violative of Fifth Amendment equal protection. Judge Pickett in *Thomas, supra,* also pointed out that, "In 1974, Congress, recognizing the hazardous nature of the work of law-enforcement officers and others, amended the retirement provisions relating to such employment. P.L. 93-350, 1 U.S. Cong. & Adm. News 1974, 395. This Act requires retirement at the age of fifty-five years. 5 U.S.C. § 8335(b)." Thus, the United States Postal Service, the United States Foreign Service, as well as its law enforcement agencies ignore the provisions of ADEA, but the United States, through its EEOC, won't allow the law enforcement agencies of one of its sovereign States also to be immune from ADEA. In one breath Congress in 1974 required federal law enforcement men to retire at 55 years, but in a second breath Congress in 1974 extended ADEA coverage to the States; thus, the United States tells the State and its law enforcement agencies to do as the United States says, but not as it does.

The Supreme Court in *Massachusetts Board of Retirement et al. v. Murgia,* 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976), has held that a Massachusetts statute mandating retirement of a state police officer at 50 years rationally furthered its purpose of assuring the physical fitness of its state police officers. It said,

> "This Court's decisions give no support to the proposition that a right of governmental employment *per se* is fundamental . . . Accordingly, we have expressly stated that a standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities' . . ."

The Court went on to hold that ". . . the Massachusetts statute clearly meets the requirements of the Equal Protection Clause." This Court assumes that the Wyoming statutes in question would similarly withstand challenge on Equal Protection grounds. Applicability of ADEA was not considered in *Murgia, supra.*

The Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, § 31-3-101, W.S. 1977, et seq., allows retirement of fulltime law enforcement officers of the Wyoming State Game and Fish Department and Wyoming Highway Patrolmen at age 55 and requires retirement at age 65. § 31-3-107(c) and (d), W.S., 1977. Wyoming Game and Fish wardens are law enforcement officers, § 9-3-1901(a)(vii) and § 7-2-101, W.S. 1977, and are authorized to make arrests and enforce criminal violations of Wyoming game and fish laws. § 23-6-101, W.S., 1977. The State's answers to interrogatories filed herein show that the Wyoming Game and Fish Commission on November 3, 1977 adopted a policy of mandatory retirement at age 55, unless the employee served in an administrative function. The Table of Organization of the Game Division of the State Game and Fish Department shows 7 district supervisors, each in direct charge of the game wardens under them. The Court must conclude that Mr. Crump is a law enforcement officer of the State of Wyoming, and not a mere administrative employee.

That the Supreme Court's holding in *National League of Cities v. Usery, supra,* is not narrowly limited to the minimum wage and hour provision of the Fair Labor Standards Act (FLSA), which it struck down, is readily apparent. A thoughtful reading of the case as well as the furor in academic circles created by the decision discloses that. Surely a case first attacked by Justice Brennan in his vigorous dissent as "an abstraction without substance" (426 U.S. at 860, 96 S. Ct. at 2478), then characterized as a "vestigal expression of states' rights philosophy,"[2] and as

[2] Barber, *National League of Cities v. Usery, New Meaning for the Tenth Amendment,* 1976 Sup. Ct. Rev. 161.

"the tip of the tenth amendment iceberg" by another,[3] and "ominous" and "outrageous" by yet another,[4] and as "a retreat from the vigorous defense of liberty and equality" by Professor Tribe of Harvard,[5] has greater impact than a ban on Congressional interference with wages and hours of State employees working in traditional State activities. The decision's language and argument are cast in broader terms.

In *National League of Cities v. Usery, supra,* Justice Rehnquist, writing for a five to four majority, held that the 1974 FLSA Amendments which broadened the coverage of the FLSA to encompass employees of a State or a political division thereof were an attempt by Congress "to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments," and said,

> "In so doing, Congress has sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system'. *Fry [v. U.S.],* 421 U.S. [542] at 547, n.7 [95 S. Ct. 1792, at 1795, 44 L. Ed. 2d 363] . . . We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional government functions, they are not within the authority granted Congress . . .",

under the Commerce Clause. He concluded that the FLSA amendments operated directly on "the States *quo* States" but that "particularized assessments of actual impacts" are not crucial to resolution of the issue, that "there are limits upon the power of Congress to override state sovereignty," rejected and overruled the reasoning of *Maryland v. Wirtz,* 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed.

[3] Heldt, *The Tenth Amendment Iceberg,* 30 Hastings L.J. 1965.

[4] Prof. Frank I. Mickelman, *States' Rights and States' Roles,* 86 Yale L.J. 1165 at 1192.

[5] Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Service.* 90 Harvard L.R. 1065.

2d 1020 (1968), and its "far-reaching implications" as "no longer authoritative". He concluded that where the States exercise "integral governmental functions" that provides services "which the States and their political subdivisions have traditionally afforded their citizens," the Tenth Amendment was a "constitutional barrier" and limitation upon Congress' power to regulate commerce. One writer concluded, as do we,

> "The broad invalidation of the Amendments without a specific analysis of their actual impact suggests that *National League* has potentially sweeping implications with respect to all aspects of the FLSA as applied to the States," 10 *Univ. of Michigan Journal of Law Reform,* 239 at 248.

It is sheer ostrichism to say the *National League of Cities* merely struck down the wage-hour provisions of FLSA without affecting ADEA.

Nor is there any gainsaying the fact that ADEA was passed by Congress under the Commerce Clause, rather than the Fourteenth Amendment. Despite the holdings of our learned brothers in *Arritt v. Grisell,* 567 F.2d 1267 at 1271 (4th Cir., 1977), *Aaron v. Davis,* 424 F. Supp. 1238 at 1241 (E.D. Ark., 1976), and *Usery v. Board of Education of Salt Lake City,* 421 F. Supp. 718 (D. Utah, 1976), and other similar cases, the legislative history of the ADEA clearly shows that in enacting the ADEA, and in extending it to the states, Congress was acting under the Commerce Clause and not under § 5 of the Fourteenth Amendment.

The Fair Labor Standards Act of 1938 was enacted under the Commerce Clause. *U.S. v. Darby,* 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941). Its coverage was extended in 1961 by P.L. 87-30, 75 Stat. 65, 29 U.S.C. § 203(s), and in 1966 when it was extended to state and local government workers employed in hospitals and health care institutions, special schools and local transit

operations (P.L. 89-601, 80 Stat. 830). ADEA was enacted in 1967 as P.L. 90-202, 81 Stat. 602 and it said,

> "The Congress hereby finds and declares that . . . the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce." 29 U.S.C. § 621(a)(4).

"Employer" was defined as "a person engaged in an industry affecting commerce . . ." 29 U.S.C. § 630(b).

The Fair Labor Standards Amendments of 1974, P.L. 93-259, 88 Stat. 55, redefined "public agency" to include the government of a State or an instrumentality of a state, thereby extending coverage to nearly all state and local government employees. Section 626(b) provides:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title:

The Plaintiff alleged in its complaint that ADEA incorporated by reference the enforcement provisions of the FLSA.

The committee reports from both the Senate and House of Representatives on the ADEA do not discuss the role of the Fourteenth Amendment with respect to age discrimination but rather state that arbitrary discrimination in employment based on age burdens commerce and the free flow of goods in commerce. See H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), U.S. Code Cong. & Admin. News, 2213 and S. Rep. No. 723, 90th Cong., 1st Sess., 13 (4 Nov. 1967). There is not a word or even a smidgen in the 1974

amendments to the ADEA or the legislative history of the amendments supporting the contention that Congress was exercising its powers under the Fourteenth Amendment. To the contrary, the policies reflected by the amendments are exclusively couched in terms of commerce. See S. Rep. No. 690, 93rd Cong., 2nd Sess., 55 (22 Feb. 1974); H.R. Rep. No. 913, 93rd Cong., 2nd Sess. (15 Mar. 1974), U.S. Code Cong. & Admin. News, 2811 and Cong. Record Vol. 120 (1974) — Dates of consideration and passage: Senate, March 7 and 18, 1974 and House, March 20 and 28, (1974). *Expressio unius est exclusio alterius.*

In the most recent Supreme Court case of *Pennhurst State School v. Halderman,* ___ U.S. ___, 101 S. Ct. 1531, 67 L. Ed. 2d ___ (1981), Justice Rehnquist says,

> "Because such legislation imposes congressional policy on a State involuntarily, we shall not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."

In *Pennhurst, supra,* which cites *National League of Cities, supra,* with approval, the majority notes that in cases going to Congress' power to secure guarantees under the Fourteenth Amendment, such as *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1975), Congress "expressly articulated its intent to legislate pursuant to § 5." Justice Blackmun's concurrence referred to matters other than the majority view relating to the Fourteenth Amendment and Justice White's dissent, concurred in by Justices Brennan and Marshall, said ". . . it should not be lightly assumed that Congress acted pursuant to its power and Section 5 in passing the Act. Here, there is no conclusive basis for determining that Congress acted pursuant to Section 5."

Because we, too, find nothing in the 1974 FLSA Amendments or their legislative history to suggest that Congress acted pursuant to any other power than the Commerce Clause, because the 1974 Act nowhere states that Congress was acting pursuant to its power to enforce

the Fourteenth Amendment, and because ADEA is inextricably bound to FLSA, a Commerce Clause Act, by Congress' own action of intertwining ADEA's enforcement power with that of FLSA, we likewise conclude that this act was passed only under the Commerce Power of Congress.

Having concluded that ADEA was authorized by the Commerce Clause, the issue then is whether Congress, as in *National League of Cities, supra*, has impaired, altered or displaced State policies or functions essential to its separate and independent existence. In *National League of Cities, supra*, the Court said of the minimum wage and maximum hour provisions of FLSA,

> ". . . their application will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, *police protection*, sanitation, public health, *and parks and recreation*. . . . Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens." (Emphasis supplied).

The management of wildlife resources by State game wardens, with powers of arrest, is surely a long-standing, traditional service of government. In *Murgia, supra*, and in *Thomas, supra*, it was recognized that compulsory retirement for law enforcement officers is a classification that is a legislative task, permissible under the Equal Protection Clause which "recognized the need for comparatively young, strong and vigorous personnel in law enforcement departments." *Thomas v. Postal Inspection Service, supra*. Any such policy of the State would be negated by the application to it of ADEA; the State could be saddled with greater economic responsibilities in keeping its law enforcement personnel on its payrolls an additional 10 years. Thus, an integral portion of government services which the States and their political subdivisions have traditionally afforded their citizens would be

affected, contrary to the Tenth Amendment and to the holding of the *National League of Cities v. Usery*.

While the Plaintiff correctly urges that the Supreme Court in *National League of Cities, supra*, did not purport to limit all exercise of Commerce Clause power against the States, as shown by its approval of *Fry v. United States*, 421 U.S. 542, 547, 95 S. Ct. 1792, 1795, 44 L. Ed. 2d 363 (1975), EEOC's argument that there is a national interest that "looms larger when balanced against Defendants' nominal interest in discriminating against its employees on the basis of age" has a hollow ring to it when the basic inconsistency of the United States is considered. How can there be a supervening national interest when the Nation itself requires mandatory retirement of its law enforcement personnel? We believe that Justice Blackmun's concurrence on the understanding that the *National League* majority was adopting a "balancing approach" provides the key to a correct understanding of *National League*, namely, that the Courts must use an ad hoc balancing test of weighing the national interest and policy against the State activity sought to be displaced by the federal regulation. Here, Justice Rehnquist's own references to the police protection and parks and recreation as typical State services traditionally rendered by States plus the inconsistency of the United States, require us to strike the balance for the State. It is

ORDERED that the complaint of the Plaintiff be, and it hereby is, dismissed with prejudice, Plaintiff to pay the costs of the parties incurred herein.

In The United States District Court
for the District of Wyoming

No. C80-0336B

Equal Employment Opportunity Commission,

Plaintiff,

vs.

The State of Wyoming, Ed Herschler, individually and as Governor of the State of Wyoming and as ex officio member of the Wyoming Game and Fish Commission, The State of Wyoming Game and Fish Commission, The State of Wyoming Game and Fish Department, Earl M. Thomas, individually and as Director of the State of Wyoming Game and Fish Department, John Anselmi, individually and as President of the State of Wyoming Game and Fish Commission, J. W. "Wes" Myers, individually and as Vice President of the State of Wyoming Game and Fish Commission, Verne Barton, Jr., individually and as a member of the State of Wyoming Game and Fish Commission, Dave Wheeler, individually and as a member of the State of Wyoming Game and Fish Commission, Alice Hayes, individually and as a member of the State of Wyoming Game and Fish Commission and Fran Osborn, individually and as a member of the State of Wyoming Game and Fish Commission, Gene Bombi, individually and as a member of the State of Wyoming Game and Fish Commission, The Wyoming Retirement System,

Defendants

(Filed: May 22, 1981)

JUDGMENT

The Court having concurrently herewith filed its Memorandum Opinion, constituting its findings of fact and

conclusions of law relating to the above-entitled matter and finding that the Motion to Dismiss of the Defendants should be granted, and the Complaint of the Plaintiff on file herein and the Amendment Complaint which was filed herein by the Plaintiff for the purpose of complying with the local rule of this Court requiring pleadings of a government agency to be signed by the United States Attorney for the District of Wyoming or one of the assistants, said Amendment Complaint being in all other particulars identical to the Complaint on file herein, should be dismissed and the Court being well-advised in the premises: it is

ORDERED, ADJUDGED AND DECREED that the Complaint and Amended Complaint of the Plaintiff be, and they are hereby, dismissed with prejudice, Plaintiff to pay all costs incurred herein.

Dated this 22nd day of May, 1981.

/s/ CLARENCE A. BRIMMER,
United States District Judge.

APPENDIX G

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Article I, Section 8, of the United States Constitution provides:

The Congress shall have Power * * *

* * * * * *

To regulate Commerce * * * among the several States * * *

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Fourteenth Amendment to the United States Constitution provides:

> Section 1.
>
> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * * nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

TITLE 29 U.S.C.A.

LABOR

CHAPTER 14 — AGE DISCRIMINATION IN EMPLOYMENT

§ 623. Prohibition of age discrimination

Lawful practices; age as occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action therwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

§ 630. Definitions

For the purposes of this chapter—

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided,* That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

§ 633a. Nondiscrimination on account of age in Federal Government employment

Federal agencies affected

(a) All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those

units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

Enforcement by Civil Service Commission and by Librarian of Congress in Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification.

(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any

complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be establsihed by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

Duty of Government agency or official

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

Pub. L. 90-202. § 15, as added Pub. L. 93-259, § 28(b)(2), Apr. 8, 1974, 88 Stat. 74.

§ 633a. Cumm. Supp. (1981)

Transfer of Functions. All functions vested in the Secretary of Labor or in the Civil Service Commission pursuant to this section were transferred to the Equal Employment Opportunity Commission by section 2 of 1978 Reorg. Plan No. 1, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees.

TITLE 5 U.S.C.A.

Government Organization and Employees

CHAPTER 83—RETIREMENT

§ 8335. Mandatory separation

(b) A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. . . .

§ 8336. Immediate retirement

(c) An employee who is separated from the service after becoming 50 years of age and completing 20 years of service as a law enforcement officer or firefighter, or any combination of such service totaling at least 20 years, is entitled to an annuity.

BALTIMORE CITY CODE 1976

ARTICLE 22

RETIREMENT SYSTEMS

34. Benefits.

(a) *Service retirement benefits.* (1) Any member in service may retire upon his written application to the Board of Trustees setting forth at what time, not less than thirty days nor more than ninety days subsequent to the execution and filing thereof, he desires to be retired, provided that the said member at the time so specified for his retirement shall have attained the age of fifty or shall have acquired twenty-five years of service as an employee, and notwithstanding that, during such period of notification, he may have separated from service.

(2) Any member in service who has attained the age of fifty-five shall be retired on the first day of the next calendar month after attaining such age, except that a member who has attained the rank of Fire Lieutenant or Police Sergeant, or equivalent grade as certified by the Department head and approved by the Board of Trustees, shall be retired when he has attained the age of sixty-five.

(4) Further, anything in this subtitle to the contrary notwithstanding, any employee covered by this System, under the rank of Fire Lieutenant or Police Sergeant, or equivalent grade, who was in service on July 1, 1962, may be continued in service until attaining age 60.

Opposition

1

Office - Supreme Court, U.S.
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CLERK

NO. 81-1112

In The
Supreme Court of the United States

OCTOBER TERM, 1981

MAYOR AND CITY COUNCIL OF BALTIMORE, et al.,
Petitioners,

v.

ROBERT W. JOHNSON, et al., and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Petition be denied for want of a necessary party?

2. Does the Petition for a Writ of Certiorari to review a case which is currently pending in the United States Court of Appeals for the Fourth Circuit, before judgment is rendered by that Court, demonstrate that this case "is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court?"[1]

3. When the United States Supreme Court dockets a direct appeal in one case, should it also grant a writ of certiorari before judgment in an unrelated case:

A. Where the case on appeal presents the dispositive legal issue clearly and adequately?

B. Where the case in which a writ of certiorari is sought will not clarify the

---

[1] Sup.Ct.R. 18.

purely legal issue presented by the appeal?

PARTIES

The Mayor and City Council of Baltimore [hereinafter the "City"] and the members of the Board of Trustees of the Fire and Police Employees Retirement System of the City of Baltimore [hereinafter the "Board"], in their official capacity, were named as defendants in the Complaint and Amended Complaint. A Judgment and Decree was entered against all of the defendants. The City appealed to the Fourth Circuit; however, the Board did not note an appeal from the Judgment and Decree of the United States District Court for the District of Maryland. Petition at 37a, App. D. Both the City and the Board are petitioners in this Court. Because the Board did not appeal to the Fourth Circuit, it is not a proper party before this Court. Accordingly, the Petition should be denied for want

of a necessary party. See discussion at 8-10, infra[2]

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[2] If, however, this Court holds that the Board is a proper party, pursuant to Sup.Ct.R. 34.2, Respondents hereby note an inaccuracy in the parties listed by Petitioners. In accordance with the automatic substitution provision of Sup.Ct. R. 40.3, the list of members of the Board should be updated by deleting Donald D. Pomerleau, Calhoun Bond, Paul C. Wolman, Jr., and Curt Heinfelder [sic], because those persons are no longer members of the Board. The following public officers should be added as Petitioners pursuant to the rule of automatic substitution: Frank Battaglia, Charles F. Peace, III, and Henry G. Parks.

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JURISDICTION

There is no question as to this Court's jurisdiction over the Petition. 28 U.S.C. §1254(1); 28 U.S.C. §2101(e). Respondents, however, seriously question whether this Court should exercise its discretion to assume jurisdiction at this time and in this procedural posture. Sup.Ct.R. 18.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES INVOLVED

Rule 18 of this Court, which governs certiorari before judgment in a court of appeals, and the certiorari portion of the Judiciary Act of 1925, 28 U.S.C. §1254, are reproduced in Appendix A.

STATEMENT OF THE CASE

Respondents, six firefighters employed by the City of Baltimore,[3] filed a suit in the United States District Court for the District of Maryland, contending that the mandatory retirement provisions of the Baltimore City Code violate the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1871, 42 U.S.C. §1983, the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 et seq. [hereinafter cited as "the ADEA"], and the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.[4] The challenged provisions were codified at Article 22, §34(a)(2,4) of the Baltimore City Code (1976, 1980 Cum.Supp.).

A non-jury trial was held before The Honorable Alexander Harvey, II, United States District Judge. The City contended

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[3] Respondent Robert W. Johnson retired, for personal reasons, on November 15, 1981.

[4] The Respondent Equal Employment Opportunity Commission intervened as a plaintiff.

that there was a bona fide occupational qualification ["BFOQ"] defense and at trial presented complex medical testimony. Several other issues raised by the City were also considered by the District Court. They were the City's contentions that: a) the ADEA, as amended is unconstitutional; b) Respondents had waived their right to rely on the ADEA, as amended; c) the claims were contractually barred; and, d) Respondent Porter lacked standing.

On June 9, 1981, the District Court filed its opinion, holding that the ADEA, as applied to state and local government, is a constitutional exercise of Congress' power under §5 of the Fourteenth Amendment. The Court rejected the Petitioners' BFOQ defense, and all of the other contentions raised by the City. On August 13, 1981, a Judgment and Decree consistent with the Court's opinion was filed.[5]

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[5] The Petitioners' motion for reconsideration was denied on September 14, 1981.

On September 30, 1981, the City noted its appeal from the Judgment and Decree and from the denial of its motion for reconsideration. Petition at 37a, App. D. The Board did not note an appeal.[6] Thus, as to the Board, the Judgment and Decree of the District Court is final and unreviewable.

The United States Court of Appeals for the Fourth Circuit has not yet decided that appeal. This case, which presents the aforesaid issues raised by the City below, has not been argued, and neither a judgment nor a mandate has been issued.

On May 22, 1981, the United States District Court for the District of Wyoming held that the ADEA, as amended in 1974, was improperly applied to state and local govern-

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[6] The Notice of Appeal filed by Petitioners states:

> "Notice is hereby given that the Mayor and City Council of Baltimore, one of the Defendants above named [in the caption], appeals to the United States Court of Appeals for the Fourth Circuit...."

Petition at 37a, App. D (Emphasis added). (Footnote continued on next page.)

ment. Equal Employment Opportunity Commission v. State of Wyoming, 514 F.Supp. 595 (D.Wyo. 1981).

Petitioners seek a writ of certiorari before a judgment in the Fourth Circuit. Although no motion to consolidate has been filed, Petitioners envision concurrent consideration of the instant case and the Wyoming case. See, e.g., Petition at 2.

The issue presented to this Court by the Petition for a Writ of Certiorari is purely procedural and discretionary. The question is whether this Court should deviate from the normal appellate process and accept for consideration one issue from a complex case, without the benefit of an intervening opinion by the Court of Appeals, where this Court has before it a direct

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6 (cont'd.)
This raises a strong inference that the Board is not aggrieved by, and does not disagree with, the District Court's decision in this case.

appeal in an unrelated case which presents the same constitutional issue.

SUMMARY OF ARGUMENT

This case is presently pending before the United States Court of Appeals for the Fourth Circuit. In an apparent effort to bypass what they view as an unfavorable forum, Petitioners seek a writ of certiorari before judgment in order to present certain constitutional issues. Petitioners, however, fail to demonstrate an issue of imperative public importance which requires immediate review in this Court. Their attack on the ADEA, as amended, based on a uniformly rejected theorem, does not meet the heavy burden imposed by Sup.Ct.R. 18. Certiorari before judgment of a court of appeals is an exceedingly unusual device which should be, and has been, sparingly used in only the most extraordinary circumstances. See Coleman v. Paccar, Inc., 424 U.S. 1301, 1304 n.*(1976) (Rehnquist, J., Circuit Justice); Aaron v. Cooper, 357

U.S. 566, 567 (1958) (per curiam). Those circumstances not being present here, the Petition for a Writ of Certiorari should be denied.

The constitutional question raised by these Petitioners, and also by the direct appeal in Equal Employment Opportunity Commission v. State of Wyoming, 514 F.Supp. 595 (D.Wyo. 1981), is a purely legal question and will be resolved by this Court in the Wyoming case, based on the Court's opinion as to the intent of Congress when it passed the 1974 Amendments to the ADEA. The instant Petition should be denied because Wyoming will be dispositive of that constitutional issue, while the present case will do nothing to assist this Court in resolving Wyoming. Because both Wyoming and this case involve public employers, because Petitioners could seek a stay of proceedings in the Fourth Circuit, and because the instant case includes voluminous medical testimony

and testimony on other issues which is wholly irrelevant to the constitutional issue, the extraordinary petition for a writ of certiorari before judgment should be denied.

REASONS FOR DENYING THE PETITION

I. BECAUSE A NECESSARY PARTY, THE BOARD, IS NOT BEFORE THIS COURT, THE PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT BY THE FOURTH CIRCUIT SHOULD BE DENIED.

As explained above, the Board did not appeal to the Fourth Circuit. It is, therefore, not properly before this Court on this Petition. The Board is, however, a necessary party in this case, because, in its absence, Petitioners cannot obtain meaningful relief in this Court and they cannot meet the standard imposed by Sup.Ct.R.18.

In administering the Fire and Police Employees Retirement System, the City acts through the Board. Article 22, §33(a) of the Baltimore City Code. Both of these entities were named as defendants below and both are bound by the District Court's

Judgment and Decree. If this Court grants a writ of certiorari before judgment to the City, and if it also reverses the District Court's order, the City would no longer be required to abide by the terms of the lower court's order. The Board, however, because it is not properly before this Court, would remain bound by the final judgment of the District Court, and the Board would be obligated to obey Judge Harvey's final injunction. Walker v. City of Birmingham, 388 U.S. [illegible], 317-18 (1967) (an injunction issued pursuant to an unconstitutional statute must be obeyed). To the extent, if any, that there is merit in Petitioners' substantive arguments, there is a grave danger that, if the writ of certiorari before judgment is granted, the mandate of this Court will impose inconsistent obligations on the defendants below.

Furthermore, because the Board is not properly before this Court, Petitioners have failed to meet the standard imposed

by the Rules of this Court, which provide that certiorari before judgment in the Court of Appeals will be granted to resolve only issues which require "immediate settlement in this Court." Sup.Ct.R.18. Even if, arguendo, the City obtained immediate relief, the Board would not obtain immediate relief. The Board, and through them the City, would still be required to comply with the ADEA, as amended, pursuant to the Judgment and Decree of the District Court because that Court has enjoined actions by the Board which contravene the ADEA. Therefore, the Petition fails to meet the requisites of Sup.Ct.R.18 and should be denied.

II. THIS EXTRAORDINARY PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT BY THE COURT OF APPEALS SHOULD BE DENIED BECAUSE THIS CASE DOES NOT PRESENT A MATTER OF IMPERATIVE PUBLIC IMPORTANCE WHICH REQUIRES IMMEDIATE SETTLEMENT BY THIS COURT, AND, THEREFORE, THE PETITIONERS HAVE NOT MET THE HEAVY BURDEN IMPOSED BY SUPREME COURT RULE 18.

A. A writ of certiorari before judgment should be granted only

when the petition presents a grave and urgent issue which must be settled in this Court.

The standard which this Court must apply to a petition for a writ of certiorari before judgment is clear and unequivocal:

> "A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court...."

Sup.Ct.R. 18 (citations omitted).[7] The power to issue an extraordinary writ of

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[7] Perhaps because Petitioners were aware of their inability to meet the heavy burden imposed by Sup.Ct.R. 18, Petitioners have failed to state that Rule in full. Petition at 2. Petitioners neglect to point out that, in addition to presenting a matter of "imperative public importance," the petition must also demonstrate that the case requires "immediate settlement in this Court." Sup.Ct.R. 18. Petitioners' selective quotation out-of-context ignores the conjunctive provisions of Rule 18 and it is both seriously misleading and a misstatement of the governing rule of procedure. Furthermore, Petitioners have inexplicably failed to reproduce Sup.Ct.R. 18, the governing rule, in their petition, as required by the rules of this Court.

certiorari before judgment has been sparingly exercised. See, Coleman v. Paccar, Inc., 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., Circuit Justice). In Youngstown Sheet and Tube Co. v. Sawyer, Mr. Justice Burton wrote:

> The first question before this Court is that presented by the petitions for a writ of certiorari bypassing the Court of Appeals. The constitutional issue which is the subject of the appeal deserves for its solution all of the wisdom that our judicial process makes available. The need for soundness in the result outweighs the need for speed in reaching it. The Nation is entitled to the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals. Little time will be lost and none will be wasted in seeking it. The time taken will be available also for constructive consideration by the parties of their own positions and responsibilities. Accordingly, I would deny the petitions for certiorari and thus allow the case to be heard by the Court of Appeals.

343 U.S. 937, 937 (1952) (Burton, J., dissenting) (emphasis added). The wisdom of this cautious approach was amply demonstrated in Aaron v. Cooper, 357 U.S. 566 (1958) (per curiam); 358 U.S. 1, 13 (1958), and Rennie v. Klein, 653 F.2d 836, 840 n.5

(3rd Cir. 1981) (en banc).

In Aaron v. Cooper, 357 U.S. 566 (1958) (per curiam), the district court had suspended a school integration plan which had been approved by the Eighth Circuit after the volatile school desegregation crisis in Little Rock, Arkansas. Subsequent to the district court's denial of an application for a stay, an appeal was taken to the Eighth Circuit, where another application for stay was filed. In addition, a petition for a writ of certiorari before judgment in the Eighth Circuit was filed in this Court. In denying that petition, the Court stated:

> "By the present petition this Court is asked to bring the case here before the Court of Appeals has had an opportunity to act upon the petition for a stay or to hear the appeal. The power of the Court to do so has been exercised but rarely, and the issues and circumstances relevant to the present petition do not warrant its exercise now....
>
> We have no doubt that the Court of Appeals will recognize the vital importance of the time element in this litigation and that it will act upon the application for a stay or the

appeal in ample time to permit arrangements to be made for the next school year.

Accordingly, the petition for certiorari is denied."

Id. at 567 (emphasis added).

The issues presented in Aaron v. Cooper, however, were so serious that, after that case was decided by the Eighth Circuit, this Court convened a special term to consider them. 358 U.S. 27 (1958). Recognizing that the case raised "questions of the highest importance to the maintenance of our federal system of government," 358 U.S. 1,4 (1958), this Court affirmed the judgment of the Eighth Circuit, prior to issuing an opinion itself, due to the urgency of the matter. 358 U.S. 29 (1958) (per curiam). Thus, as the subsequent opinion of the Court, 358 U.S. 1, 13 (1958), issued by all nine Justices, made clear, the Court's faith in the Eighth Circuit was borne out, and the vital and urgent issue was resolved promptly and properly without granting a writ of cer-

tiorari before judgment by the Court of Appeals.[8]

In the wake of the Little Rock school desegregation crisis, where there was a direct state challenge to the authority of this Court, an event which raised the specter of nullification and which required the President to dispatch federal troops, this Court refused to issue certiorari before judgment in the Eighth Circuit. Aaron v. Cooper stands as a compelling precedent in the instant case. The present petition demonstrates none of the urgency which was characteristic of Aaron v. Cooper.

Most recently, in Rennie v. Klein, No. 80-6660, ____ U.S. ____, 101 S.Ct. 3059 (1981), this Court denied a petition filed pursuant to Sup.Ct.R.18 for a writ of certiorari before judgment in the Third

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[8] The use of federal troops occurred in late 1957. The district court suspended the school desegregation plan on June 20, 1958. This Court denied certiorari on June 30, 1958. The Eighth Circuit ruled on August 18, 1958.

Circuit. Rennie v. Klein, 653 F.2d 836, 840 n.5 (3rd Cir. 1981) (en banc). In Rennie, the issue was whether involuntarily committed mental patients have a constitutional right to refuse psychotropic drugs which may have permanently disabling, or even fatal, side effects. Id. at 838, 843-44. The district court "defined a qualified constitutional right to refuse treatment and issued a preliminary injunction directing New Jersey to establish an independent review mechanism that went beyond procedures already prescribed by the state." Id. at 838. The decree required both "positive action and substantial expenditures by the state" and it would have had "a significant effect on the state budget...." Id. at 841. Rennie presented a constitutional issue of major importance and time was of the essence because the potential physical injuries were irreparable. This Court, however, denied the petition for a writ of certiorari before judgment in the Third Circuit. Id.

at 840 n.5. Thus, a petition involving forced administration of psychotropic drugs to involuntarily committed mental patients, even though such medication had potentially permanent disabling side effects, did not present an issue worthy of a writ of certiorari before judgment. Sup.Ct.R.18. The present case, involving neither potential permanent disability nor anything remotely similar to the forced use of mind-altering drugs on involuntarily committed patients, is even less compelling than Rennie.[9]

Writs of certiorari before judgment in a court of appeals have been granted only during, and in order to resolve, extreme national emergencies. For example, where the power of the President of the United States is challenged during a national

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[9] Subsequent to the denial of the petition for a writ of certiorari before judgment, the Third Circuit modified the district court's injunction and remanded the case. Thus, the petitioners obtained relief in the Court of Appeals without the extraordinary writ.

crisis, a writ of certiorari before judgment has been issued. Dames & Moore v. Regan, ___ U.S. ____, 101 S.Ct. 2972 (1981) (challenge to President's attempt to resolve Iranian hostage crisis); United States v. Nixon, 418 U.S. 683 (1974) (dispute between President and Special Prosecutor); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) (challenge to President's power to takeover the nation's steel mills); Ex parte Quirin, 317 U.S. 1 (1942) (per curiam) (challenge to President's power to establish Military Commission to try saboteurs in the continental United States). Urgent foreign policy questions have justified issuance of a writ of certiorari before judgment. Dames & Moore, ____ U.S. at ____, 101 S.Ct. at 2991; Wilson v. Girard, 354 U.S. 524 (1957) (per curiam) (dispute between Japan and United States). A writ of certiorari before judgment has been issued where the entire national economy was endangered. United States v. United Mine Workers of America, 330 U.S. 258

(1947) (coal miners' strike disrupting transition from war to peace); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Great Depression).

The cases in which this Court considered issuing a writ of certiorari before judgment demonstrate the extraordinary nature of such action. They present a historical narrative of our nation's crises, stretching from the Great Depression through international disputes, from wartime sabotage through "Watergate," often involving issues of liberty or executive power during a time of national emergency. In recent years, the standard has been applied in an even stricter manner than it was in the depression years. E.g., Aaron v. Cooper, 357 U.S. 566 (1958) (per curiam); Rennie v. Klein, 653 F.2d 836, 840 n.5 (3rd Cir. 1981) (en banc).[10]

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[10] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), cited by the Petitioners, does not support their request for certiorari before judgment in the Court of Appeals, because all of the cases in Brown were heard either on direct appeal pursuant to 28 U.S.C. §1253 or after a decision by the highest court of the state. Id. at 486 n.1.

Clearly, as the federal dockets have burgeoned and the intermediate court system has demonstrated its reliability and value, it has become less desirable to accelerate review in this Court.

B. This case does not meet the strict standard for granting a petition for a writ of certiorari before judgment.

1. The case at bar does not require immediate settlement in this Court.

The present case does not justify deviation from the normal appellate practice because it does not require "immediate settlement in this Court." Sup.Ct.R. 18. Initially, it should be pointed out that at no time during the pendency of the instant litigation, including the appeal, have Petitioners filed a motion to expedite the proceedings. In fact, Petitioners have not taken any action to accelerate the resolution of this case. Thus, throughout this dispute, Petitioners' own actions have demonstrated the absence of any urgency.

Unlike United States v. Nixon, 418 U.S. 683 (1974), the instant case does not involve an explosive wartime dispute between the Chief Executive and a Special Prosecutor which threatens to sharply divide an already-polarized nation. There is no threat to the national security, as there was in the World War II case of the German saboteurs, Ex parte Quirin, 317 U.S. 1 (1942) (per curiam); no threat to the national economy, as in the Great Depression cases and United States v. United Mine Workers of America, 330 U.S. 258 (1947); and, there is no international dispute, as in Wilson v. Girard, 354 U.S. 524 (1957) (per curiam). In short, none of the urgent considerations which have, in the past, persuaded this Court to depart from normal appellate practice is present here. Moreover, the inconvenience, if any, suffered during the time involved for the case to be decided by the Fourth Circuit is outweighed by the advantages of avoidance of congestion in this Court and by the soundness

of result which the normal appellate process produces. See Aaron v. Cooper, 357 U.S. 566 (1958); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 937 (1952) (Burton, J., dissenting).

Petitioners denigrate the normal appellate process, viewing the appeal in the Fourth Circuit as a mere formality. They allege:

> "[T]he [Supreme] Court should note that this is a case of review 'before judgment' only in a technical sense.... The only judgment that the Fourth Circuit could enter would be a pro forma affirmance on the authority of its prior Arritt decision...."

Petition at 2-3 n.4. Because the District Court made numerous holdings, Petitioners' statement is incorrect and misleading. The Fourth Circuit could, for example, reverse the District Court on the BFOQ issue, thereby obviating the perceived need for an expeditious grant of a writ of certiorari. Similarly, reversal on one or more of the other issues is possible. Furthermore, the

Fourth Circuit has never had the opportunity to analyze Arritt v Grisell, 567 F.2d 1267 (4th Cir. 1977), in light of the recent pronouncements of this Court. Even if the Fourth Circuit reaffirms Arritt, it could hold that the District Court improperly applied the ADEA, as amended, when it struck down the provisions of the City Code. Appeal to the Fourth Circuit, therefore, is not merely an arid procedural technicality. Because Petitioners may receive all of the relief they desire in the Fourth Circuit, see, e.g., Aaron v. Cooper, 358 U.S. 1, 13 (1958), there is no need to address the issues immediately in this Court.

Finally, if Petitioners' characterization of Equal Employment Opportunity Commission v. Wyoming is correct, the constitutional issue soon will be decided in that case, and there is no need to grant a writ of certiorari before judgment in this case. The Wyoming opinion will apply to the instant case, and, therefore, there is no urgency presented by

this case.

2. The instant case does not present an issue of imperative public importance.

This case does not present an issue of "imperative public importance," as required by Sup.Ct.R.18, because the District Court correctly applied settled, well-recognized principles of law, holding that the ADEA, as amended in 1974, is constitutional. If the instant case was aberrant, or if the district court had flagrantly abused its discretion the issue could conceivably be characterized as imperative; however, no such irregularities are present in the lower court's decision.

With the exception of Equal Employment Opportunity Commission v. State of Wyoming, 514 F.Supp. 595 (D.Wyo. 1981), the courts are unanimous in holding that the ADEA, as amended, is a valid exercise of Congress' power. Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); Carpenter v. Commonwealth of Pennsylvania, 508 F.Supp. 148

(E.D.Pa. 1981); Equal Employment Opportunity Commission v. County of Los Angeles, 27 F.E.P. Cases 904 (C.D.Cal. 1981); Adams v. James, 27 F.E.P. Cases 877 (M.D.Ala. 1981); Equal Employment Opportunity Commission v. Calumet County, 26 F.E.P. Cases 20 (E.D.Wis. 1981), appeal pending; Orzel v. City of Wauwatosa, Case No. 79-C-444 (E.D.Wis. August 31, 1981); Equal Employment Opportunity Commission v. City of Allen Park, Civil Action No. 79-72986 (E.D.Mich. June 30, 1981); Marshall v. Delaware River and Bay Authority, 471 F.Supp. 886, 891-92 (D.Del. 1979); Equal Employment Opportunity Commission v. Florissant Valley Fire District, 21 F.E.P. Cases 973 (E.D.Mo. 1979); Marshall v. City of Philadelphia, 17 F.E.P. Cases 869 (E.D.Pa. 1978); Remmick v. Barnes County, 435 F.Supp. 914, 916 (D.N.D. 1977); Aaron v. Davis, 424 F.Supp. 1238, 1241 (E.D.Ark. 1976); Usery v. Board of Education of Salt Lake City, 421 F.Supp. 718, 720-21 (D.Utah 1976).

Moreover, this Court recently noted the expanded coverage of the ADEA without even the slightest intimation that the Act, as applied to state and local government, was improper:

> "Congress expanded the scope of ADEA in 1974 to include state, local, and federal government employers. State and local governments were added as potential defendants by a simple expansion of the term 'employer.'"

Lehman v. Nakshian, ____ U.S. ____, ____, 101 S.Ct. 2698, 2704 (1981).

The Petition is both misleading and incorrect where Petitioners point to "a clear conflict between the various lower courts on the constitutional authority of the ADEA as amended and applied to State and local government" as a basis for the grant of certiorari. Petition at 13 (citing cases in n.19). There is no conflict in the circuits because the only circuit which has considered the issue is the Fourth Circuit in Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977). See Petition at 13 n.19. The only conflicting case is the Wyoming case.

Because the rules of this Court authorize certiorari to resolve a dispute among the circuits, not among "the various lower courts," Sup.Ct.R. 17.1(a), the Petition is improper.

Moreover, the cases relied upon by the Petitioners are inapplicable, because Marshall v. Baltimore and Ohio R. Co., 461 F.Supp. 362 (D.Md. 1978), affirmed in part, reversed in part, 632 F.2d 1107 (4th Cir. 1980), appeal pending, and Usery v. Manchester East Catholic Regional School Board, 430 F.Supp. 188 (D.N.H. 1977), both involved private, non-governmental employers.[11]

III. THE PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT SHOULD BE DENIED BECAUSE: A) THE WYOMING APPEAL PRESENTS A PURELY LEGAL ISSUE WHICH WILL BE DISPOSITIVE OF THE QUESTIONS PRESENTED IN THE INSTANT PETITION; AND, B) THE CASE AT BAR WILL NOT ASSIST THIS COURT IN RESOLVING THE PURELY LEGAL ISSUE WHICH IS BEFORE THIS COURT ON THE WYOMING APPEAL.

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[11] In Usery v. Board of Education of Salt Lake City, 421 F.Supp. 718 (D.Utah 1976), the district court held that the ADEA, as applied to the school board, is constitutional whether it is grounded on the Commerce Clause or the Fourteenth Amendment.

A. The Petition should be denied because the Wyoming appeal will be dispositive of the purely legal issue raised in the questions presented by these petitioners.

The issue presented by the Wyoming appeal, the constitutionality of the ADEA, as amended, is a purely legal question, specifically, whether Congress properly exercised its enumerated powers when it enacted the 1974 Amendments which made the ADEA applicable to state and local governments. The answer to that question does not turn on any extrinsic factual applications. Instead, the intent and power of Congress is the critical factor. If, for example, Congress acted pursuant to §5 of the Fourteenth Amendment when it amended the ADEA, there can be no doubt as to the validity of the Amendments. In ascertaining the Congressional source of authority, this Court should examine three sources: 1) the text of the statute; 2) the legislative history; and, 3) analogous statutes. Despite Petitioners' contentions to the contrary,

nothing which occurred in the trial of this case on its merits will assist this Court in determining the intent of Congress. In fact, the bulk of the testimony below was medical testimony concerning the BFOQ defense and is not relevant to the purely legal, constitutional issue presented in Wyoming.

Petitioners argue that, because Wyoming presents a particular constitutional issue to this Court, this Court should issue a writ of certiorari before judgment in order to consider the same issue in the case at bar. The logical import of Petitioners' argument is that whenever this Court considers a constitutional issue, it should also issue a writ of certiorari before judgment to consider all pending cases which may present the same issue. This would mean that at the present time this Court should grant certiorari before judgment in Equal Employment Opportunity Commission v. Elrod, No. 79-C-4120 (N.D.Ill. September 17, 1980),

appeal docketed, No. 80-2810 (7th Cir.), and, EEOC v. Calumet County, 26 F.E.P. Cases 20 (E.D.Wis. 1981), in which appeals are pending on this same issue.

The flaw in Petitioners' argument is that it ignores the role of this Court and the function of the discretionary certiorari jurisdiction of this Court. The Judiciary Act of 1925, 28 U.S.C. §§1254, 1256-57, "both greatly expanded the Court's discretionary jurisdiction and sharply contracted its obligatory jurisdiction. This statute was designed to enable the Court to maintain flexible but firm control over the nature and volume of its work." Gressman, Much Ado About Certiorari, 52 Geo. L.J. 742, 744 (1964). As Mr. Chief Justice Taft said:

> "No litigant is entitled to more than two chances, mainly, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions

> and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal."

Id. at 755, quoting hearings before the House Committee on the Judiciary, 67th Cong., Second Sess., at 2 (1922) (Taft, C.J.)(emphasis added).

This Court is "more than a super-appellate tribunal designed to give litigants a second or third chance for relief. That is the key to an understanding of both its workload and its business." Gressman at 761. Thus, this Court operates by selecting and deciding only certain special cases. Petitioners' argument ignores this key aspect of this Court's capacity and would, if accepted, seriously overburden this Court.

B. The case at bar will not assist the Court in resolving the purely legal issue which is before it on the Wyoming appeal.

Petitioners argue that the instant case will illuminate and clarify the constitutional issue presented to this Court by the direct

appeal in Wyoming. Petition at 13-17. They state: "The record therein [in Wyoming] is necessarily scant: the record in the instant case not only allows the conclusion that the Act is unconstitutional, but demonstrates why the Act is unconstitutional." Id. at 16. Thus, Petitioners argue that the complex evidence introduced in the case at bar, including the testimony on the BFOQ issue, will materially assist this Court in determining whether the amended ADEA, as applied, is constitutional. This argument is without merit.

Petitioners totally ignore that the only relevant and essential fact that is involved in deciding the issue raised in both Wyoming and this case, is whether the defendant employer is a state or local government. Both Wyoming and the instant case involve state or local government employers. Accordingly, there is no difference between a municipal firefighter and a state law enforcement officer in the

context of the constitutional question presented by the ADEA, as amended. Moreover, both the application of the ADEA and the evidence on the BFOQ and other issues are completely irrelevant in determining the purely legal constitutional issue presented. The case at bar, therefore, will not illuminate the constitutional issue presented in Wyoming. On the other hand, this Court's ultimate decision in Wyoming will illuminate the constitutional issue in this case.

Rather than seeking premature review in this Court, the better practice would be for Petitioners to seek a stay of their appeal in the Fourth Circuit pending this Court's decision in Wyoming. This procedure would obviate all of the Petitioners' concerns.

CONCLUSION

The petition for a writ of certiorari before judgment by the Fourth Circuit should be denied and Respondents should be awarded costs and attorneys' fees.[12]

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12 29 U.S.C. §216(b); 42 U.S.C. §1988

Respectfully submitted,

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APPENDIX

Supreme Court Rules

Rule 18. Certiorari to a federal court of appeals before judgment

A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court. See 28 U.S.C. §2101(e); see also, United States v. Bankers Trust Co., 294 U.S. 240 (1935); Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935); Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936); Ex parte Quirin, 317 U.S. 1 (1942); United States v. Mine Workers, 330 U.S. 258 (1947); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Wilson v. Girard, 354 U.S. 524 (1957); United States v. Nixon, 418 U.S. 683 (1974).

28 U.S.C.
§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree....

Opposition

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Office - Supreme Court, U.S.
FILED
FEB 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1112

In the Supreme Court of the United States

OCTOBER TERM, 1981

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL., PETITIONERS

v.

ROBERT W. JOHNSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the 1974 amendment of Section 11(b) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 630(b), to include State and local governments within the coverage of the Act is invalid under the Tenth Amendment to the Constitution.

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MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. App. 1a-30a) is reported at 515 F. Supp. 1287.

JURISDICTION

The judgment of the district court was entered on August 13, 1981 (Pet. App. 31a-32a). Following denial of their motion for reconsideration on September 14, 1981 (Pet. App. 33a-34a), petitioners filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit on September 30, 1981 (Pet. App. 37a-38a). The petition for a writ of certiorari before judgment was filed on December 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCE INVOLVED

Sections 4(a)(1) and (2) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(a)(1) and (2), provide:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age * * *.

Sections 4(f)(1) and (2) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 623(f)(1) and (2), provide:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall

require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual * * *.

The Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) and the pertinent portions of the Tenth and Fourteenth Amendments to the Constitution are set forth at Pet. App. 60a. Baltimore, Md., Code art. 22, § 34 (1976) is set forth in pertinent part at Pet. App. 64a.

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. (& Supp. III) 621 *et seq.*, prohibits employers from discriminating on the basis of age against employees who are between the ages of 40 and 70 by, *inter alia*, discharging them or requiring them to retire involuntarily. Sections 4(a)(1), 4(f)(2) and 12(a) of the Act, 29 U.S.C. (& Supp. III) 623(a)(1), 623(f)(2) and 631(a). In 1974, Congress amended the Act to extend its prohibitions against age discrimination in employment to State and local government employers. Section 11(b), 29 U.S.C. 630(b).

Baltimore Md., Code art. 22, § 34 (1976) requires the involuntary retirement of City firefighters at age 55, with two exceptions. Members who have attained the rank of Fire Lieutenant are involuntarily retired at age 65, and lower-ranking employees who were in service on July 1, 1962, are involuntarily retired at age 60 (*ibid.*).

Four of the six individual respondents in this case are Baltimore City firefighters who are over 60 years of age.[1] Another of the respondents, Robert W. Johnson, also was a firefighter over 60 years of age (Pet. App. 2a n.2), but he

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[1]Respondents Stern, Doyle, Paris and Robey. The district court found that all individual respondents complied with the procedural prerequisites to suit under the Act (Pet. App. 2a n.2).

retired for personal reasons on November 15, 1981 (Robert W. Johnson, et al. Br. in Opp. 2 n.3). The sixth respondent, James Porter, is a City firefighter who is 32 years of age and who will be required to retire in the year 2003 when he reaches age 55. The Equal Employment Opportunity Commission was permitted to intervene as a plaintiff on March 4, 1980 (Pet. App. 2a).[2]

2.a. After trial, the district court found that the provisions in the Baltimore City Code for the mandatory retirement of firefighters at age 55 or 60 violate the ADEA, and the court enjoined petitioners from enforcing those provisions against employees of the Baltimore City Fire Department (Pet. App. 31a-32a).[3] In holding the retirement provision unlawful, the court rejected petitioners' assertion that the application of the Act to prohibit age discrimination by State and local governments violates the Tenth Amendment to the Constitution (Pet. App. 8a-9a). The district court relied on *Arritt* v. *Grisell*, 567 F. 2d 1267 (4th Cir. 1977), which had rejected the same argument.

b. On the merits, the district court rejected petitioners' contention that age is a bona fide occupational qualification that is "reasonably necessary to the normal operation"[4] of the Fire Department and that the City therefore could

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[2]The Equal Employment Opportunity Commission is the agency charged with enforcing the Act. See Section 2 of Reorg. Plan No. 1 of 1978, 92 Stat. 3781.

[3]Because of its decision based on the ADEA, the district court did not reach the individual respondents' contentions that the involuntary retirement provision violates 42 U.S.C. 1983 and the Fourteenth Amendment. Respondents did not challenge the right of the City to require their retirement at age 65, when officers of the Fire Department must retire. Pet. App. 17a, 64a.

[4]See 29 U.S.C. 623(f)(1).

require the individual respondents to retire at age 60[5] rather than age 65.[6] With respect to the five individual firefighters in this case who were over age 60, the court found the evidence "overwhelming that [respondents] have not only performed satisfactorily since they became sixty, but in most instances their performance has been more than satisfactory and even exceptional" (Pet. App. 18a). The court further observed that the "evidence presented indicates that all five of these [respondents] are today as qualified as younger employees of the Department to perform their duties as firefighters" and that, "[i]ndeed, [petitioners] have not sought to introduce any evidence to indicate that any one of the [respondents] cannot carry out his assigned duties because of physical or other reasons" (*ibid.*).

The district court also rejected the City's argument that age nevertheless is a bona fide occupational qualification (BFOQ) because substantially all firefighters would be unable, past age 60, to perform their duties safely and efficiently. The court noted that "historically Baltimore firemen have always worked past that age and even up to age seventy" (Pet. App. 19a). The court noted as well that even when the retirement system was revised in 1962, firefighters who chose to remain covered by the previous retirement system and worked past age 60 "have continued to perform their duties satisfactorily" and have "in no way affected the high caliber of the services performed by the Baltimore City Fire Department" (*ibid.*). In the court's

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[5]The district court's discussion pertained principally to the respondents who were over age 60 and subject to mandatory retirement at that age. Under the Baltimore City Code, respondent Porter will be subject to mandatory retirement when he reaches age 55, in the year 2003.

[6]As noted above (see note 3, *supra*) the individual respondents did not challenge the right of the City to require their retirement at age 65, and the district court therefore did not reach that question. Pet. App. 17a.

view, the lowering of the mandatory retirement age was particularly difficult to justify because the burdens undertaken by older firefighters had been reduced as a result of the shortening of the work week (from 66 hours to 48 hours) and technological improvements over the years, especially the development and use of oxygen breathing apparatus (*id.* at 19a-20a).[7]

Finally, the court rejected petitioners' argument that the mandatory retirement at age 55 or 60 is the most reliable way of removing employees suffering from coronary disease and that it is impossible or impractical to deal with the retirement of firefighters over age 60 on an individualized basis. The court found respondents' expert testimony on this point "much more convincing" than that of petitioners (Pet. App. 21a). Respondents' evidence indicated that chronological age must be considered but is not determinative of an individual's ability to perform a firefighter's duties and that exercise tolerance tests, supplemented by other tests and procedures, can be used at relatively little expense to determine whether a firefighter is physically and medically fit to perform his job (*id.* at 21a-23a). Even petitioners' own evidence, the court concluded, indicated that firefighters with cardiac problems can be evaluated on an individualized basis and retired if necessary (*id.* at 24a).

For the foregoing reasons, the court concluded that petitioners had not carried their burden of showing that reliance on age alone in making retirement decisions is

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[7]The court also noted that a survey of the fire departments in 30 of the Nation's largest cities indicated that 22 had mandatory retirement ages of 65 or older or no mandatory retirement age at all, four had mandatory retirement ages of between 60 and 65, and four had a mandatory retirement age of 60. Baltimore was alone in requiring retirement at age 55 (except in the case of firefighters, such as the five respondents herein, who were covered by a grandfather provision and therefore could remain in service to age 60). Pet. App. 20a & n.14, 64a.

"reasonably necessary" for operation of the Fire Department and therefore that age is a bona fide occupational qualification. Because the court concluded that the mandatory retirement age of 60 could not be sustained under the ADEA, the court concluded that, a fortiori, the mandatory retirement age of 55 for respondent Porter and others who are not protected by the grandfather provision in the City Code is invalid (Pet. App. 27a).[8]

ARGUMENT

Petitioners seek extraordinary review by this Court of the decision of a district court prior to judgment by the court of appeals. Rule 18 of the Rules of this Court states that a petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate pratice and to require immediate settlement in this Court." See, *e.g.*, *Dames & Moore* v. *Regan*, No. 80-2078 (July 2, 1981), slip op. 9; *United States* v. *Nixon*, 418 U.S. 683, 687 (1974). The instant case plainly does not satisfy this standard.

Although, under the district court's judgment, four firefighters over age 60 will remain in the service of the City's Fire Department, petitioners did not seek to prove that any of the four cannot perform their duties as firefighters or would imperil the safety of others. The judgment below would not prevent the City from taking appropriate action

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[8]The court also rejected petitioners' argument that five of the six respondents had waived their rights under the Act by electing in 1962, 1963, and 1967 to participate in the city Fire and Police Employees Retirement System. Because the provisions of the ADEA were not extended to local governments until 1974, and because the prohibition against involuntary retirement pursuant to a bona fide pension plan or seniority system was not enacted until 1978, the court declined to consider respondents' earlier election to participate in the retirement system as an effective prospective waiver of their statutory rights (Pet. App. 9a-12a).

in such circumstances in any event; that judgment only bars the City from requiring the mandatory retirement of all firefighters between ages 60 and 65 without regard to their ability to perform their duties. Moreover, if necessary, the City could seek a stay of the district court's judgment if it appeared that the safe or efficient operation of the Department would be impeded. Thus, there is nothing in the facts of this case requiring immediate resolution by this Court. Indeed, deviation from normal appellate practice would be particularly inappropriate here, because it is possible that the court of appeals would conclude that age is a bona fide occupational qualification for the City's firefighters and thereby sustain the City's mandatory retirement program on statutory grounds, without any need to consider petitioners' constitutional arguments.

Petitioners contend (Pet. 9-13), however, that the legal issue they seek to raise—whether the application of the ADEA to State and local governments violates the Tenth Amendment—warrants immediate review by this Court prior to judgment in the court of appeals, even if this particular case, standing alone, does not warrant such review. This contention is sufficiently answered by reference to the listing in footnote 19 of the petition of numerous cases—some decided as much as four or five years ago—which have sustained the application of the ADEA to State and local governments. Nothing in the intervening period suggests that immediate resolution of this legal issue outside of the normal appellate course is now imperative. But however that may be, this Court will have an opportunity to resolve the very constitutional issue petitioners seek to raise in *EEOC* v. *Wyoming*, probable jurisdiction noted, No. 81-554 (Jan. 11, 1982), on the government's direct appeal from a decision striking down the ADEA as applied to State employees, *EEOC* v. *Wyoming*, 514 F. Supp. 595 (D. Wyo. 1981). In view of that direct appeal, certiorari before

judgment is not necessary in the instant case in order to ensure the prompt resolution of the constitutionality of the ADEA as applied to State and local governments.

Petitioners nonetheless contend (Pet. 13-17) that certiorari before judgment should be granted in this case because, in their view, the district court's analysis of the BFOQ defense did not show sufficient deference to the employment determinations of State and local governments and because the Court may wish to have before it the record in this case when it considers the constitutional issue presented in *EEOC* v. *Wyoming, supra*. This line of reasoning in support of certiorari before judgment fails for several reasons.

First, petitioners' argument is, at bottom, nothing more than a disagreement with the district court's application of the BFOQ defense in the particular circumstances of this case, in view of the special attributes required of persons in firefighting and other public safety occupations. This is an ordinary question of statutory interpretation, and one that is not directly involved in *EEOC* v. *Wyoming, supra*, with which petitioners seek to link this case. Thus, in petitioning for certiorari before judgment here, petitioners seek to broaden the question presented in *EEOC* v. *Wyoming*. Moreover, if, as petitioners maintain, the district court erred in its application of the BFOQ test, that issue may be resolved in their favor by the court of appeals without the need for review by this Court.

Nor, contrary to petitioners' contention, is certiorari before judgment warranted in order that the Court may have before it the record in this case. The district court found, on the basis of that record, that mandatory retirement solely on the basis of age is not reasonably necessary for the operation of the Baltimore Fire Department, in view of evidence establishing that firefighters between ages 60 and 65— and particularly the five individual respondents

herein—were able to perform in a satisfactory manner and that an individualized determination of fitness for duty is feasible. Petitioners, in effect, ask this Court to make an initial review of the evidence and findings, to conclude that the district court's reasoning gives insufficient weight to the City's employment policies, and to reverse the district court's judgment on this ground. Even assuming that such a fact-bound issue would be appropriate for resolution by this Court (but see Sup. Ct. R. 17.1), the extraordinary procedure of certiorari before judgment should not be invoked for such a purpose, which would foreclose an opportunity for the thorough review of the record and the district court's findings that ordinarily is the province of the court of appeals.[9]

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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FEBRUARY 1982

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[9]Petitioners also argue (Pet. 9-13) the merits of the district court's constitutional holding. The position of the EEOC on this issue is set forth in the Jurisdictional Statement in *EEOC* v. *Wyoming*, *supra*, and need not be rehearsed here.

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Petitioner's Reply Brief

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No. 81-1112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.,
Petitioners,

v.

ROBERT W. JOHNSON, ET AL.,

AND

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FOURTH CIRCUIT

REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 81-1112

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REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners submit this reply brief and pray that a writ of certiorari issue to the Court of Appeals to review the judgment in this case of the United States District Court for the District of Maryland.

ARGUMENT

I.

THE DEMONSTRATION OF A SIGNIFICANT IMPACT ON THE GOVERNMENTAL BODIES INVOLVED IS AN IMPORTANT ELEMENT TO BE CONSIDERED IN DETERMINING THE CONSTITUTIONALITY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (ADEA) AS APPLIED TO POLITICAL SUBDIVISIONS, AND WARRANTS CONSIDERATION OF THIS PETITION FOR A WRIT OF CERTIORARI IN LIGHT OF THE APPEAL IN *EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. STATE OF WYOMING*, 514 F. SUPP 595 (D WYO. 1981), *prob. juris. noted*, ___ U.S. ___ (1982) (NO. 81-554, 1980 TERM).

In *National League of Cities v. Usery*, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct 2465 (1976), this Court weighed the impact of amendments to the Fair Labor Standards Act of 1938 upon the States' ability to function effectively in the federal system. Important, although not crucial,[1] to the Court's decision was the adverse effect which the amendments to the law had upon the integrity of political subdivisions in terms of dollars, reduction in training for safety personnel and the displacement of important State policies regarding the manner in which those subdivisions must structure delivery of governmental services to their citizens.

Similarly, in *Pennhurst State School & Hospital v. Halderman*, ___ U.S. ___, 67 L. Ed. 2d 694, 101 S. Ct 1531 (1981), this Court wrote, "We would be attributing far too much to Congress if we held that it required the States, at their own expense, to provide certain kinds of treatment." *Pennhurst, supra* at 67 L. Ed. 2d 716.

If the Tenth Amendment is to have any significance, federal laws which regulate and impose affirmative duties on political subdivisions must be analyzed in terms of their *effect* on those political subdivisions. The effect on a

[1] *National League of Cities, supra*, 426 U.S. at 851.

political subdivision's citizenry of retaining a State Game Warden beyond a reasonable mandatory retirement age is not the same as retaining other public safety personnel such as firefighters or policemen, although all those employees would be fulfilling functions which are essentially governmental.

The fundamental question decided in *Wyoming, supra*, was what Congress intended when it passed and amended the ADEA. The essential question which must ultimately be resolved by this Court is what legislation may or may not be applied to political subdivisions because of Tenth Amendment prohibition? Those questions are similar, but not identical. The contribution which this Petition will make to *Wyoming, supra*, now pending before this Court, is that petitioners will demonstrate some of the threats to the public safety which this Act imposes upon public employers. This record will also demonstrate how important State and local policies have been displaced by this legislation, even though those policies were reached by the same process which Congress used to establish the mandatory retirement age for federal employees performing a similar, but much safer, function. 5 U.S.C. Section 8335(b).

The petitioners did not raise before this Court every issue which needs be resolved in the appeal of this case. What petitioners seek to do through their Petition for a Writ of Certiorari, and sought to do in their Motion to Consolidate and Expedite Consideration of the Petition, is to demonstrate for this Court, which has noted probable jurisdiction in *Wyoming, supra*, the extent and cost in fiscal and human terms of displacing the decisions of local governments.

The petitioners also would demonstrate how "reasonable" exemptions to employers have undergone a *reductio ad absurdum*. There is a grave danger that the existence of a bona fide occupational qualification (BFOQ) may be a

factor in assessing the impact of legislation on political subdivisions. Petitioners would demonstrate that such a BFOQ does not lessen the burden on public employers, who must bear the ultimate responsibility for protecting their citizenry from harm. Congress placed extreme burdens upon political subdivisions in extending the ADEA to cover them as employers. On one hand, political subdivisions were told that with respect to law enforcement and firefighting, political subdivisions had no interest in exercising their sovereign prerogative[2] to retire mandatorily its employees to the extent that it could not show that age was a BFOQ. On the other hand, crucial aspects of public safety, contract, cost and legislative judgment are not considered by the BFOQ. Thus, what was intended to be a shield for employers has turned out to be meaningless to political subdivisions, which are charged to hire, compensate and retire public safety personnel.

Petitioners also dispute Respondents' claim that this case is not of imperative public importance. Admittedly, this case does not present the controversy attendant to *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 937, 96 L. Ed. 1344 (1952), but petitioners are not asking this Court to consider an issue of constitutional law based solely upon this Petition. In point of fact, this Court has noted probable jurisdiction in *Wyoming, supra*, and the issues presented therein will be resolved by this Court, with or without the amplification and illumination which petitioners' case would provide.

Where petitioners cases were of assistance to it, this Court has granted Certiorari to Courts of Appeals before judgment. *Taylor v. McElroy*, 358 U.S. 918 and 360 U.S. 709. In *Taylor*, 360 U.S. at 710, this Court granted

[2] The federal government has retained the right, as an aspect of sovereignty, to retire many different classes of employees mandatorily. See 5 U.S.C. Section 8335 and *Vance v. Bradley*, 440 U.S. 93, 59 L. Ed. 2d 171, 99 S. Ct 939 (1979).

certiorari to the Court of Appeals before argument was had in that Court because of the pendency of *Greene v. McElroy*, 360 U.S. 474, 3 L. Ed. 2d 1377, 79 S. Ct 1400 (1959). The *Taylor* case involved an industrial worker who was denied clearance to classified defense information and consequently discharged from his employment. Thus, there is authority that Writs of Certiorari will be granted to Courts of Appeals before judgment where other cases are pending even though the issues do not raise the profound issues decided in *Youngstown, supra.*

Similarly in *Bolling v. Sharpe,* 347 U.S. 497, 98 L. Ed. 884, 74 S. Ct 693 (1954), this Court granted a Writ of Certiorari before judgment in the Court of Appeals because of the pendency of an Appeal in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct 686 (1954). In *Brown v. Board of Education of Topeka*, 344 U.S. 1, 91 L. Ed. 3, 73 S. Ct 1 (1952), this Court took judicial notice of a fourth case, the *Bolling* case, and was of the opinion that the nature of the issue posed in the consolidated Appeals in *Brown* and the effect of any decision which the Court rendered in those cases was such that it was well to consider simultaneously the constitutional issues posed in the case of *Bolling v. Sharpe.* Thus there is authority that petitioners may receive concurrent consideration of their case with the pending Appeal in *Wyoming.*

II.

THE RESPONDENTS' REMAINING ARGUMENTS IN OPPOSITION ARE ERRONEOUS.

A. Respondents suppose that the Petition is improper because the Rules of the Court authorize certiorari to resolve disputes among Circuits. *Brief for Respondents in Opposition* at p. 27. Respondents' argument ignores the plain language of Rule 17, which reads in pertinent part,

> "The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered." *Supreme Court Rule 17.1.*

By way of illustration, petitioners previously set forth some decisions on the constitutional authority of the ADEA to show the conflict between various lower Courts. *Petition for Writ of Certiorari*, p. 13 n. 9. Respondents argue that cases involving private employers are inapposite; but this clearly misses the point of the argument. Different constitutional authority was found by the various lower Courts, and as to the *authority* of the Act, it makes not one wit of difference whether the defendants were private or public employers. In the instant case, the petitioners are a political subdivision, and the ultimate constitutional authority, which is the decision which must be made by this Court, may affect political subdivisions and not private employers. Petitioners submit that Rule 17 is illustrative of the kinds of reasons for which certiorari will be granted, but by the Rule's very words, this Court's discretion is not as circumscribed as Respondents believe.

B. Respondents argue that the Board of Trustees of the Fire and Police Employees Retirement System is not a party to the Petition. The Petition for Writ of Certiorari was filed to review the judgment of the United States District Court for the District of Maryland. Supreme Court Rule 19.6 reads, in pertinent part,

> "All parties to the proceeding in the Court whose judgment is sought to be reviewed shall be deemed parties in this Court unless the petitioner shall notify the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition."

Clearly, according to the Rules of the Supreme Court, the Board of Trustees is a party.

Even assuming the Board is not a party, the real party in interest was, is, and shall be the Mayor and City Council of Baltimore. The Mayor and City Council of Baltimore are the legal entities in privity of contract with the members of either retirement system. Baltimore City Code (1976 Ed., as amended to July 1, 1979) Article 22, Section 42.[3] The Code which established the retirement system says that when the respondents became members of the Fire and Police Employees Retirement System, they were deemed to have entered into a contract with the Mayor and City Council of Baltimore, the terms of which were the provisions of Article 22. The Mayor and City Council pay the compensation of employees or pensioners. Charter of Baltimore City (1964 Rev.) Article VII, Section 7.[4] Generally, the Board of Trustees has no powers except to adopt rules and regulations for its operation. *Id.*, Section 1.[5] It has no duties except to seek the enforcement of the Retirement Ordinance as promulgated and adopted by the Mayor and City Council of Baltimore.[6] The view that the Board is an administrative board and has no authority to appropriate money or obligate the Mayor and City Council beyond the express obligations of the contract, was adopted with respect to the predecessor of the Board of Trustees of the Fire and Police Employees Retirement System, the Board of Trustees of the Employees Retirement System in the case of *Fallin v. Mayor and City Council of Baltimore, et al*, 193 Md. 464, 67 A.2d 256 (1949). Municipal corporations and their officials are treated as being in privity of judgment for purposes of suits by or against either one. *Patton v. Dumpson*, 498 F.

[3] The text of this section of the Baltimore City Code appears in the Appendix, *infra*, p. 1a.

[4] The text of this section of the Charter of Baltimore City appears in the Appendix, *infra*, p. 2a.

[5] Id., p. 2a.

[6] The Board of Trustees also makes decisions concerning the investment and management of the Trust Fund, functions which are irrelevant here.

Supp. 933 (S.D.N.Y. 1980); 50 C.J.S. *Judgments* Section 796 at 337 (1947); 56 Am. Jur. 2d *Municipal Corporations* Section 8774 (1971). As the court wrote in *Patton, supra,*

> " . . . [A] judgment for or against a public officer, in an action brought by or against him in his official capacity is conclusive on the municipal corporation which he represents. Conversely, a judgment for or against a municipal corporation is binding and conclusive on an officer thereof, except with respect to his private or individual rights or interests." *Patton, supra* at 943.

Respondents mislead the Court with respect to *Walker v. Birmingham,* 388 U.S. 307 (1967). The *Walker* case stands for the proposition that the unconstitutionality of an Injunction may not be attacked collaterally in a prosecution for contempt for violating the Order. Essentially, one who violates even an unconstitutional Injunction does so at his peril. This Court cited the Supreme Court of Alabama in *Fields v. City of Fairfield,* 273 Ala. 588, 143 South 2d 177, *rev'd. on other grounds,* 375 U.S. 248, 11 L. Ed. 2d 311, 84 S. Ct 360 (1963) as follows:

> "As a general rule, an unconstitutional statute is an absolute nullity and may not form the basis of any legal right or legal proceedings, yet until its unconstitutionality has been judicially declared in appropriate proceedings, no person charged with its observance under an Order or Decree may disregard or violate the Order or the Decree with immunity from a charge of contempt of court. . . ." *Fields, supra,* cited in *Walker, supra,* at 388 U.S. 320.

Petitioners and Respondents have agreed, insofar as practicable, to preserve the status quo pending the resolution of this case. The Board of Trustees does not intend to violate the Injunction until its unconstitutionality is conclusively demonstrated, and therefore the *Walker* case is absolutely inapposite. Indeed, the *Walker* case may be cited for the point of law embodied in the decision of the

Alabama Supreme Court and cited with approval in the *Walker* decision; as a general rule, an unconstitutional statute is an absolute nullity and may not form the basis of any legal right. Thus whether the Board of Trustees, which is simply a ministerial body which has not been clothed with any discretionary functions except to enforce the Retirement System code, is a party to the appeal in the Fourth Circuit is inconsequential to the case presented to this Court.

CONCLUSION

For the foregoing reasons and the reasons heretofore set forth in the Petition, it is respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

BALTIMORE CITY CODE
(1976 EDITION)

ARTICLE 22
RETIREMENT SYSTEMS

CONTRACTURAL PROVISIONS

42. Contractural relationship.

Upon becoming a member of either of the Retirement Systems established under this Article 22, the member shall thereupon be deemed to have entered into a contract with the Mayor and City Council of Baltimore, the terms of which shall be the provisions of this Article 22, as they exist at the effective date of this ordinance, or at the time of becoming a member, whichever is later, and the benefits provided thereunder shall not thereafter be in any way diminished or impaired.

APPENDIX B

CHARTER OF BALTIMORE CITY

(1964 REVISION)

ARTICLE VII
EXECUTIVE DEPARTMENTS
GENERAL PROVISIONS

1. GENERAL PROVISION — *Executive Power.* Except as committed to the Board of Estimates or to the Comptroller or otherwise provided in the Charter, the executive power of the City shall be vested in the Mayor, the departments, commissions and boards provided for in this Article and such special officers, commissions and boards as may be provided for by law or ordinance not inconsistent with the Charter. The several heads of departments, commissions and boards (whether or not provided for in this Article) shall have the power to adopt such rules and regulations, not inconsistent with laws or ordinances, for the operation of their respective departments, commissions and boards as they may deem appropriate.

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7. DEPARTMENT OF FINANCE — *Disbursements.* The Department of Finance shall have general supervision and charge over all payments and disbursements made by the City and no payment or disbursement shall be made by the City without the approval of the Department. The compensation and pensions of all officers and of the employees of all municipal agencies shall be paid through the Department and all claims against the City under the Workmen's Compensation Act shall be investigated, settled and paid under the supervision of the Department.